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THE AMERICAN LAW REGISTER AND REVIEW.

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No. 1.

THE POSSIBILITY OF NEW LEGAL OBLIGATIONS.

*"One thing I take to be clear, and it is this that public policy is a variable quantity; that it must vary and does vary with the habits, capacities and opportunities of the public."*¹

I.

Legal obligations and rights are the expressions of our ideas of public policy. One who regards the law, in so far as it is just, as springing from inborn and necessary conceptions of right and wrong has but to turn to legal history. Let him select what is to him the simplest example of a law following natural justice and trace the history of that law. He will generally find his own ancestors denying the obligation which he considers binding as a matter of necessary intuition. Take, for instance, the rule of our law, that he who has, with the skill of his hands, fashioned a useful article, owning the article, has a right to the proceeds of its sale. To us there is nothing which seems to spring more from the inborn necessities of things. We brush aside the fact that slavery has existed in almost every society which the world has known, on the ground that the institution is a wrong and contrary to nature. We quote with approval the words of Blackstone: "It is repugnant to reason, and the principles of natural law,

¹ Remarks of Mr. Justice Kekewich in *Davis v. Davis*, 36 Ch. D. 359.

that such a state should exist anywhere."¹ But all who are familiar with our legal history, know that this rule of law, depends on the recognition of individual existence. In primitive society the individual only exists as an indistinguishable part of a large unit—his family or his tribe. The wrong of one member of a family can be wiped out by the death of another member, or a payment of the *wergeld* by the family of the wrongdoer to the family of the injured party. The Gods, angry at the sins of the evil members of a tribe, are propitiated by the sacrifice of any member of that tribe.² That the fruits of the labor of the individual should belong to the larger unit of which he formed a part is as natural to one stage of civilization as the opposite rule is to us. And both rules meet the requirements of a sound public policy. In early stages of social development isolation meant extermination, or, at least, precluded any advancement. Only those primitive peoples who can hold together overcome the adverse conditions resulting from primitive environment. Had the same strong feeling of individuality existed in a primitive society as in our own, the disintegrating forces would have been so strong that it would have been impossible to have had a continuous social life, and man could not have lifted himself out of barbarism. The rule of primitive law is suited to primitive conditions. On the other hand, once society has gotten over the embryo stage, there is much less danger of disintegration. When a strong sense of social unity has created a government able to protect the individual in his rights, and hold him as an individual responsible for his acts, then it would seem that the highest attainments of the civilization were only compatible with a wide freedom of individual action.

To take another illustration. The two fundamental rules of our law, the right of private property and the freedom of private contract, are usually accepted by us without question

¹ B. 1., p. 423.

² In India, where new and old ideas are blended, in the dancing girl cast, the gains of science are divisible, that is, belong to the family of the worker as a whole, when gained while receiving a family maintenance: *Alasani v. Ralnachalam*, Madras H. C. Repts. 56.

as right, because they correspond to the conditions of our life. Yet neither existed in feudal times. Dual ownership of property, and status were the fundamental conceptions on which feudal society rested. The villain did not own the land he tilled or the cattle with which he tilled it. Both belonged, in one sense, to the lord, yet the lord had to give him the land and the cattle. The villain could not leave the land, and contract with another lord. Nor did he want to. His desire was to obtain a fixed status in the community; not to be free, but to owe certain services to some one. To be free,—that is, without a lord who would be responsible for him, was to be *flyma*, a fugitive, and the words of Athelstan must have had an ugly sound; "let whoever can come at him slay him as a thief."¹

The desirability of the sole ownership of property, the freedom to contract at will, wear different aspects in different stages of social progress. Our ideas of the desirable are the result of our conditions. There is no legal conception, however apparently fundamental, which time with its changes may not alter.

The thought here expressed receives almost universally a partial recognition. Most men of education can point out the main lines of development of the more fundamental of our legal conceptions. But it is curious to observe that so few recognize the possibility of any further change in the conditions of life which may affect a further radical change in our ideas. Rousseau and his followers regarded the complete freedom of the individual from governmental restraint as the final goal of civilization. Spencer, in spite of his half discovery of the principle of evolution, regards, the formula, that every man should have all the liberty that does not interfere with the equal liberty of any other man, as being continually necessary to all future progress. It is not that these men, and they are typical of a large class, do not look for further progress. They are apostles of progress. But that progress is always to be conditioned on the recognition of some idea concerning society, government or the individual. If we look at this idea, we will gene-

¹ Athelst, II., Sec. 2, cited in Andrews Old Saxon Manor, 12, 178.

rally find that their belief in it is due to the fact that it satisfies the best views of present public policy based on existing conditions. Take the example of the two men we have mentioned. The government which governed least was the best government for the eighteenth century. Liberty of opportunity, economic as well as political, has been the highest duty of society in the nineteenth century. Will it not be strange if changing conditions will not push some other idea forward as fundamental to the mind of the men of the twentieth century? The explanation of the mental attitude of which we speak lies in the fact that before they have projected their fundamental idea forward as the *sine qua non* of human progress, they have read it back into history, making history one long proof of how much better society as a whole would have been at every stage of its development, had it realized the beauty of the fundamental principle. Rousseau shows the advantage of freedom at all stages of progress, and Spencer points to the survival of the fittest among all animal life wherever the fullest liberty, compatible with equality, is allowed. Had these men not been engrossed in explaining their respective theories, they would have seen that many stages of past development were made possible by the practical application of principles the reverse of their own. Thus, the rise of the chief in the village community made it possible for the Western world to move out of primitive communism, and take its first great step in progressive civilization. Yet the rise of the chief destroyed equality, and curtailed the liberty of the great mass of the community. The result was great opportunity to the few, and the condition fitted the needs of the time. The Greek never passed the stage which makes economic inequality essential to progress. Plato, therefore, as our own publicists, reading history and all future in the light of the conditions which confronted him, made the slavery of the many the basis of his "Republic."

What is true of the theories of Spencer is true of Rousseau. Great upward movements of our race have been the result of a practical application of ideas, the exact opposite of that advocated by his school. Thus, in the Middle Ages, we find the evils of feudalism dying before a strong central gov-

ernment. The great architectural triumphs of that age and the beauty of the work of the artisans generally, bespeak the fact that the guild, with its direct interference with trade, produced laborers who must have gotten something out of life which ours do not get, to give so much to their art. However ill-suited the old mercantile system was to the last century, somehow a few centuries back, a country which maintained the balance of trade in its favor, was the successful country.¹ The result of all which is, that what is good for us may not have been good for our ancestors, or be of advantage to our descendants. A general recognition of this idea will have several beneficial results. It will improve our historical sense, and stop shallow criticism of our ancestors for not following what we think is the only right way. Again, it will enable those who discuss the value of any idea concerning law or government of men to select the phenomena which can throw light upon it.

II.

If all our rules of law, no matter how fundamental are subject to change, with changing conditions, it may not be a wholly profitless task to inquire whether there are any changes going on around us which forbode a change in some of our fundamental legal conceptions. There are many things which are new in the nineteenth century. Industrial organization has undergone a profound change. With the general nature of the industrial change of our time all are familiar. It is the consolidation of the direction of industry in a few hands. Where there were at the beginning of the century small establishments, there are now large works; involving the concentration of an enormous amount of labor and capital. These changes have not gone on equally in all branches of production. In agriculture there has been comparatively little development in the direction indicated. In transportation, the manufacture of sugar, the production of oil, anything, in short, where the capital necessary to produce any commodity at all is large, the consolidation of the direction of the industry in the hands of a

¹ This assertion is still a subject of dispute. See *contra*, Cunningham's "Growth of English Industry and Commerce."

few is complete. Other industries, where large capital to produce some result is not necessary do not seem to escape the tendency of the time. The small retailer gives place to the large department store; within the last few years the entire boot and shoe production has passed out of the hands of those who make boots and shoes to order and into the hands of the ready made shoe manufacturer. We might go on multiplying familiar instances *ad infinitum*, but the main fact remains—the real control of industry in many of its branches is in the hands of a few individuals or corporations.

Because law is the outcome of our environment, and because there are new conditions, it does not necessarily follow that any very radical change is going to take place in our law. The change from stage coaches to railroads made a vast difference in our means of transportation, but it did not introduce any new principles into the law relating to the carrier's liability for the safety of the goods committed to his care. But on the other hand, as I have tried to show, all law does depend on the proper public policy for the conditions which exist, and the changes in the conditions of life which have been going on for the past eighty years are great enough to produce the most profound changes in our law.

Industry may be said to consist in the production and exchange of commodities. Production requires land, labor and capital. The *entrepreneur* is the man who organizes the forces of production, and who owns and sells the completed product. The industrial changes of which we have been speaking are changes which affect primarily the *entrepreneur*. At the beginning of the century the laborer worked for wages and he still works for wages. The position of capital is substantially the same. The *entrepreneur* alone has changed. Relatively he has become a less numerous class. As an individual and on the average he employs more men and he sells more product. If there is to be any change in our law as a result of our new industrial life, it is to be in the relation of the *entrepreneur* with those with whom as *entrepreneur* he comes in contact; that is the laborer and the purchaser of his goods. We need not expect to find any change in the relation of

one laborer to another, or of one purchaser to another purchaser.

In our present law the relation of the *entrepreneur* to his men on the one hand, and the purchaser of the completed product on the other, is a purely contractual relation. It is an exchange of goods for money, or services for money, on the basis of a contract determined between the parties. The *entrepreneur* has a right to contract with whom he pleases for the work that he wants done, and, owning the completed product, he can sell it for the best price that he can get. The common law recognizes no obligation on the part of the workmen to labor, or the *entrepreneur* to employ him or pay him any certain wages. There is no obligation on the *entrepreneur* to part with his goods at a reasonable price.

The question which I desire to examine is this—Have the industrial changes of which I have been speaking affected, or are they likely to affect, the legal relation between the *entrepreneur* and the purchaser of goods on the one hand, or the laborer on the other; and first to turn to the *entrepreneur* as a seller of the completed commodity.

III.

The common law has always regarded trade as of sufficient public importance to set aside the right of those who are engaged in it to do exactly as they please. The restrictions of the common law have not been directed to contracts between the seller and the buyer, but to contracts between sellers or producers among themselves to limit competition. Ever since the reign of Henry V.,¹ and probably from the time that trade was important to the State, an agreement between two persons to restrain one of them from exercising a particular trade or calling has been *prima facie* illegal.² The ground of this interference with the right of free contract has been, as a rule, the familiar maxim that "competition is the life of trade."³

¹ 2 H. V., pl. 22.

² *Horne v. Graves*, 7 Bing. 735; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173.

³ *Hooker v. Vandewater*, 4 Denio (N. Y.) 349.

Thus Judge McIlvaine, in *Salt Lake City v. Guthrie*,¹ says: "Public policy unquestionably favors competition in trade to the end that its commodities may be offered to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices, to the injury of the general public."² Mr. Arthur T. Hadley has an interesting article in the *Yale Review*,³ in which he points out that while "the Roman Law allowed free determination of prices as a consequence of the unrestricted right of private property, the Common Law encouraged it as a means of supplying a market more fully and fairly than could be done in any other way. The common law both in its rule and exceptions recognize the public commercial end, which the Roman Law did not." The Roman Law left trade unrestricted because trade was of comparatively slight importance to the Roman people. A large portion of the industrial activity of Rome was the work of those whose products were consumed by their own masters. Trade was not as it is with us the life of the state.

Not only have the Courts refused to enforce contracts between two or more producers regulating their output, or controlling prices, but both the United States and the several states have passed laws making such contracts between producers indictable offences. None of our Courts have intimated that these acts are unconstitutional as depriving the producer of his natural rights.⁴ The spirit which passes these acts, and the spirit which accepts them as unquestionably unconstitutional, is the same spirit which led Judge Hull in the case from the Year Books, where the plaintiff sought to enforce an agreement of the defendant not to exercise his trade as a dyer for half a year, to exclaim: "*per diem si le plaintiff fut ici, il irra al prison, tang il ut fait fine al roy*," and which led Chief

¹ 35 Ohio, 666.

² Judges, however, have doubted the validity of this maxim; see *Perkins v. Lyman*, 9 Mass. 321, and cases cited by Mr. G. S. Patterson in his work on "The Law of Contracts in Restraint of Trade."

³ Vol. I., p. 56 (May, 1892). See for a discussion of this article one by the present author on "Can Prices be Regulated by Law," 32 AM. LAW REV. & REV. 9.

⁴ *United States v. E. C. Knight Sugar Refining Co.*, 156 U. S. 1; *People v. North River Sugar Refining Co.*, 54 Hun. (N. Y.) 354.

Justice Parker, in *Mitchell v. Reynolds*,¹ to declare that, "to obtain the sole exercise of any trade throughout England was a monopoly and a crime." Thus, the State has always regarded one who trades as engaged in an occupation in which his freedom of contract is limited, whenever the exercise of that freedom interfered with the established views of what was public policy for the trade as a whole. It being considered that combinations among producers tending to control a market, are prejudicial to the interests of the people, any act having this effect is more or less a crime. In this instance the welfare of the State overrides the sacredness of the right of private contract.

It must be borne in mind that contracts in restraint of trade are declared illegal, not because an agreement between producers has any inherent viciousness, but because it tends, by stifling competitions between producers, to create a monopoly, placing the community which purchases the product at the mercy of the seller. Where the agreement has not this result it is upheld by the court.²

Thus, the answer of the early common law, and of our modern law, as far as we have followed the early spirit, to the tendency toward centralization in modern industry, is that when that centralization takes the form of an agreement between individual producers to submit to a joint control over their several businesses, the law will meet the economic tendency by declaring it illegal.

Prior to the last few years, agreements in restraint of trade of the kind discussed in the cases was the only way in which a monopoly could be created in an industry. But the increased familiarity of the business world with the joint stock company, or business corporation, has now rendered it possible for a monopoly to be secured, not by the agreement of distinct producers, but by the creation of a corporate entity as the sole producer. Take, for instance, the American Sugar Refining Company. This corporation produces practically all the

¹ 1 P. Williams.

² *Wickers v. Evans*, 3 T. & J. 318; *Diamond Match Co. v. Roeber*, 106 N. Y. 473.

sugar in the United States, yet, in the old sense of the word, it is not an agreement in restraint of trade. The different producers of sugar sold out to the corporation. They did not agree not to re-enter the sugar refining business, yet business conditions make such a re-entry out of the question.

The result, which has caused the courts from the earliest times to declare contracts in restraint of trade illegal, exists. The contract is absent, but the buyer is none the less at the mercy of the seller. There are two ways in which the buyer can be protected. Either the law can say that the ownership by an individual or a corporation of all or substantially all, the means of production in a particular industry is illegal, or the State can undertake the work of fixing the maximum charge for the products of the industry.

In regard to laws rendering illegal the acquirement by one person, natural or artificial, of all the means of production in a single industry, it may be pointed out, that this is an attempt to make law run counter to what seems to be a natural economic tendency. The success of such legislation may well be doubted. Even if such success were possible, it might be sacrificing a great good to prevent one evil. In favor of the single producer, it can be urged that competition is ever producing the ruin of some of the competitors; that production is cheapened by consolidation; that while competition may be the life of trade, it often kills the trader, and that a society whose industries are not subject to great fluctuations, means a society in which the people are happier. There is something in this argument. But the thing which chiefly concerns us here is the legality or practicability of such legislation from a purely legal point of view. As far as a law limiting the amount of a certain kind of property which an individual can acquire is concerned, our courts, would certainly declare it unconstitutional. The right of a man to pursue happiness is synonymous with his right to acquire property, and the right to pursue happiness is written in every State constitution. The Fourteenth Amendment has placed it to some extent under the protection of the Federal Government. The attitude of our Federal judges towards such legislation is

undoubtedly hostile. Take, for instance, the expression of the members of the Supreme Court of the United States regarding the graded income tax law passed by the Fiftieth Congress. Justice Field says: "The income tax under consideration is marked by discriminating features which affect the whole law. . . . Whenever a distinction is made in the burdens a law imposes or in the benefit it confers on any citizens by reason of their birth or wealth or religion, it is class legislation, and leads inevitably to oppression and abuses and to general unrest and disturbance in society."¹ While Mr. Justice Fuller says: "Not that it (the law) is not open to abuse by such deductions and exceptions as might make taxation under it so wanting in uniformity and equality as in substance to amount to a deprivation of property without due process of law."² If this was the courts attitude toward a graded income tax we may know what it would be towards an act limiting the amount of property which an individual could acquire in business.

In regard to laws limiting the amount of property held by corporations, the peculiar relations of our State and national government make the difficulties in the face of such legislation practically insuperable. The United States cannot limit the property held by a corporation or, in fact, affect the business of producing in any way.³ Each State could limit the corporations in its own State, but it cannot control the action of other States. A policy limiting the amount of property to be acquired by a corporation, to have any hope of success, must be adopted by all the States. But our States have never yet shown sufficient vitality to construct joint-state legislation. Any State which attempted to pass such legislation by itself would find that the result of its legislation would be the exodus of capital and energy from the State. Lastly, it may be seriously doubted how far such legislation could affect corporations already formed, and not impair the obligation of contract with the corporation contrary to the mandate of the

¹ *Pollock v. Farmers Loan and Trust Co.*, 157 U. S. 596.

² *Rehearing*, 158 U. S. 601, pp. 633-34.

³ *United States v. E. C. Knight & Co.*, 156 U. S. 1.

Federal Constitution. From whatever side, therefore, economic or legal, which we regard the question, we are forced to the conclusion that if the consumer is to be protected, it must be from the side of price regulation, and not by an attempt to force back the wheels of economic change, and re-create a multitude of producers competing with each other.

Price regulation has this advantage ; it gets at the evil produced by the monopoly directly. As has been stated, the evil from the consumer's point of view is not the combination, neither is it the control of an industry by a single person, but the resultant position of all buyers who can buy only from one seller. The recognition of the right of the State to regulate prices would, in one sense, be a recognition of the old principle of the law that he who enters a trade must be limited in his right of contract where such limitation is necessary to secure to the consumers reasonable prices, that is, prices not greatly in advance of the cost of production. On the other hand, it would be a recognition of a distinctly-new right on the part of the buyer, and a corresponding obligation on the part of the seller ; the one to have and the other to sell at a reasonable price. While many will ask, will not the industrial changes going on around us make the recognition of the right and obligation necessary, none will deny the profound change, which will result in our most fundamental conceptions of private law.

The Legislature and the courts have taken a long step forward in the recognition of such a right. For many years the States have regulated the rates of fare charged by railway companies. The Supreme Court of the United States has upheld this legislation,¹ though the right to regulate interstate fare has been denied on the ground that such regulation was a matter exclusively for the federal government under the commerce clause of the Constitution.² The courts have recognized the right of the public to a reasonable charge in the absence of any legislation on the subject.³ In *Munn v.*

¹ *Chicago, Burlington & Quincy R. R. Co. v. Iowa*, 94 U. S. 155.

² *Wabash, St. Louis & Pacific Railroad Co. v. Illinois*, 118 U. S. 557.

³ *Cowden v. Pacific Coast S. S. Co.*, 39 Pac. Rep. 873 ; *Railroad Company v. Suttien*, L. R. 4 H. L. 238.

Illinois,¹ the Supreme Court upheld the constitutionality of an act declaring all grain warehouses public warehouses and regulating the charges for the storage of grain. The grounds of the decision were stated by Chief Justice Waite. He said that there existed a practical monopoly, and that the business of grain storage, as a whole, was essential to the proper handling of the grain of the country. This decision has been twice affirmed by the court, in *Budd v. New York*² and *Brass v. Stoeser*.³ In both these cases, we have a dissent opinion by Mr. Justice Brewer, in which Mr. Justice Field and, in the last case, Justices Jackson and White concurred.⁴ The ground of the dissent is set forth by Mr. Justice Brewer in *Budd v. New York*. He draws a distinction between a public use and public interest. A public use is a use which the State alone has a right to create and maintain. A highway is an example of such a use. If an individual does that work, he is, *pro tanto*, doing the work of the State. "The State doing the work fixes the prices for the use. It does not lose the right to fix the price, because an individual voluntarily undertakes to do the work."

This public use is very different from a public interest. There is scarcely any property in the use of which the public has no interest. In reply to the suggestion that there is a monopoly, and that justifies legislative interference, he points out that there are two kinds of monopolies, one of law and one of fact. The former exists when exclusive privileges are granted by the State. "A monopoly of fact any one can break . . . Government can prescribe compensation . . . only when the property is in fact devoted to a public use."

"It may be noted here that Mr. Justice Field dissented in *Munn v. Illinois*. He also dissented in the *Granger Cases*,

¹ 94 U. S. 113.

² 143 U. S. 517.

³ 153 U. S. 391.

⁴ The court, therefore, stood five to four. It is curious to note that Mr. Justice Brown, who dissented in *Budd v. New York*, does not dissent in the later case. Had he done so, the principle in *Minnesota v. Illinois* would have been overruled, and the right of the State to regulate prices declared to be limited to occupations in which the right of eminent domain, or some other attribute of sovereignty, was necessary for the prosecution of the business.

Chicago, Burlington & Quincy R. R. Co., and others following *Munn v. Illinois*, which upheld the right of a State to regulate the charge of railroads. In one of these cases, *Stone v. Wisconsin* (p. 181), he gives as his reason for his dissent that it takes the property of the corporation without due process of law. "Of what avail," he asks, "is the constitutional provision that no State shall deprive any person of his property except by due process of law, if the state can, by fixing the compensation which he may receive for its use, take from him all that is valuable in the property?" He draws no distinction between a railroad company and another business not requiring the exercise of the right of eminent domain, or between a public and a private business. The Court, in the case of *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*,¹ declared, Mr. Justice Field concurring, that the regulation in rates must be reasonable, and that the Courts were the only ultimate determinators of what was a reasonable rate. The objection urged by Mr. Justice Field against the *Granger Cases*, that the principle would result in the confiscation of railroad property, therefore falls. The present objection to *Munn v. Illinois*, which proceeds on the ground of a distinction between the companies doing the work of the State, was not thought of until some time after that case was decided. No case preceding *Budd v. New York*, makes any mention of such a distinction. The distinction, however, would be likely to occur to one who read the authorities cited by Chief Justice Waite in *Munn v. Illinois*. The first English authority cited is Lord Chief Justice Hale's treatise, "*De Portibus Maris*," 1 Harg. Law Tracts, 6. The author is speaking of the right to regulate prices. He then says, "If the king or subject have a public wharf, into which all persons that come to that port must come . . . because they are the wharfs only licensed by the Queen . . . or because there is no other wharf in that port, as it may fall out where a wharf is newly erected; in that case there cannot be taken arbitrary and excessive duties . . . but the duties must be reasonable and moderate." This is the law to-day: *Eusminger v. People*,²

¹ 134 U. S. 418.² 147 Ill. 384.

The other English authority is the case of *Allnutt v. Inglis*,¹ decided in 1810, and to it may be traced a suggestion of the idea that, in order to regulate the price, there must be a monopoly in law. A dock company owned a warehouse situated on one of its docks. An Act of Parliament permitted the storage of wines before payment of duties confining the privilege to the warehouse of this company. The court decided that the company must be content with a reasonable compensation. The facts of the case fall well within Mr. Justice Brewer's definition of a legal monopoly. Lord Ellenborough, who decided the case, bases his decision on the language of Lord Hale just quoted. He says that it "includes the good sense as well as the law on this subject." There is no intimation that he would not approve the regulation of the rates of charge where the monopoly was one of fact arising from the circumstance that there was only one warehouse in the port. There is a repetition of Hale's language on this point, without any comment. But the facts of the case before him made the following language, copying as it did part of the language of Hale all that was necessary: ". . . but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms." As, heretofore, most of the monopolies of fact are also monopolies in law, it is natural that the thought should have been formulated by Mr. Justice Brewer, that only the prices of products, or services in which there was a legal monopoly, could be regulated by law.²

That this view is shared by almost, if not quite, a majority

¹ 12 East. 569.

² The American case cited by the court is *Mobile v. Fuller*, 3 Ala. (N.S.) 137. (This case cites all the early English Law on the subject). The Supreme Court of the State upheld the constitutionality of an act permitting the City of Mobile to regulate the price of bread. The decision of the court is placed on the public nature of the calling. The court points out that upon the same principle, "the country court is required at least once a year to settle the rates of inn keepers." The courts may have some criteria of what is a public interest, but none is intimated, and it would almost follow that all prices could be regulated by law, or at least that a monopoly in fact or law was not the only evidence that a business was affected with a public interest.

of the present members of the Supreme Court and by a great number of constitutional lawyers, must be admitted. Indeed, it is more than probable that it will soon be the settled doctrine of the courts. But if present economic tendencies are to continue, the real defect in the argument will become apparent. That defect lies in making a theory of government rather than social and economic conditions the basis of the rules of law. When a distinction is drawn between a monopoly of fact and one of law, it must be remembered that the distinction is a valid one as affecting the power of the State to regulate prices only, when conditions make a real difference in the power of the monopoly and the importance of controlling the price of its commodities. If a monopoly exists in fact in the production and sale of oil, and as a matter of fact it is impossible for any person natural or corporate to enter the business, the result is just the same to the consumer as if the production of oil was one which, according to Mr. Justice Brewer, "the public could create and maintain." It is not the public nature of the business, but the fact of the monopoly, and the importance of the business to the community which is the force behind State laws regulating the rates of fare on railroads.

Just now, following Mr. Hadley, I drew a distinction between the Roman Law and the Common Law, pointing out that the former allowed free determination of prices as part of the unrestricted right of private property, while the common law in its rules on this subject recognized the commercial end. The position of Mr. Justice Brewer in his argument, laying stress as it does on the importance of the free control of property by the owner, would seem an abandonment of the theory of the Common Law for that of the Roman Law. This change appears unfortunate, because at the bottom of the Common Law rules on this subject is the recognition of the fact that "trade is the life of the State." And, as we have pointed out trade is to us, as it was not to the Romans, of first importance. Unconsciously, Mr. Justice Brewer himself recognizes this. For, while adopting in part arguments appropriate to the Roman conditions, he really justifies his conclusion by trying to show that his position does not hurt

trade. He says: "A monopoly in fact any one can break," and indeed he intimates that all monopolies of fact are due to the superior service which the so-called "monopolist" gives the public. "It exists," he says: "Where any one by his money and labor furnishes facilities for business which no one else has," and he instances the case of a man who erects the only good office building in a city. If all monopolies of fact were of this character the distinction between monopolies of fact and law in connection with the legality of price regulation, might be a valid, and certainly would be a harmless distinction. But the economic facts are against the learned justice. There are already many monopolies of fact arising from other causes than superiority of service. And, if the prices of goods, when the production is practically monopolized, cannot be affected by law, then our law is in this condition: Agree with your competitor to raise prices, and we will put you in prison; but combine with your competitor, form a corporation, and you can charge what prices you want, the courts will declare all adverse legislation unconstitutional. Such a condition of our law will not long exist, except it be that the monopoly feature of production is to be confined to a few industries. If that feature is to be extended, we will be forced to recognize a new obligation on the part of the producer, an obligation to sell his goods at prices which the courts shall declare reasonable.

Next month I shall try to take up the question whether new economic conditions are likely to have any affect our legal conceptions of the relation of employer and employee.

William Draper Lewis.

Philadelphia, January 1, 1897.

THE INCIDENTS OF IRREGULAR INCORPORATION.

In a recent number of this Magazine¹ the writer called attention to certain fundamental questions in regard to the legal status of corporations upon which the authorities are divided. Among the problems at that time referred to as illustrations of the conflict of authority, were those which arise when a number of persons engage in business under corporate form but without complying with all the formalities prescribed by the law under which they are associated. Can a creditor who has dealt with these persons as a corporation take advantage of the defect in organization and treat the associates as partners? What shall be said of a case in which, for the sake of gaining a limited liability, a business man complies with the *letter* of a corporation law, but not with its *spirit*, by associating with himself the requisite number of "men of straw," thus obtaining a charter in pursuance of an attempt to put a corporate name between himself and his creditors? Can those who, with intent to form a corporation, engage in business before the corporate charter is obtained, subsequently escape personal liability for debts contracted before the grant of the charter, in virtue of their unexecuted intention to become a corporation? Again, can a corporation when sued upon one of its obligations set up the irregularity of its own organization as a defence to the suit? If, as a plaintiff, the corporation sues to enforce an obligation, is it liable to be met with a defence based upon the irregularity of its organization? Questions such as these are of such great practical importance that we cannot long rest satisfied with the doubtful answers given to them by the courts. The commercial world has a right to demand that our legal doctrines shall be more definite.

As a modest contribution to the cause of uniformity the following considerations are submitted to the profession. In submitting them, it is not improper to suggest that much of

¹ Vol. 2, N. S. (May, 1895), p. 296.

the confusion found in the reported decisions results from a failure to treat the problem in its entirety. There is a tendency to deal with the case which happens to be before the court as if it presented an isolated question, to be answered independently of other questions which are rarely akin to it. Again, it may be suggested that much of the criticism which has been indulged in at the expense of the courts has been an unintelligent and, in some instances, a perverse criticism. The House of Lords, in *Broderip v. Salomon*,¹ has recently decided, in the case of one who had abused the privilege of limited liability offered by the Companies Acts, while keeping within the letter of the statutes, that there are no means of legally ascertaining the motives and intentions of persons forming limited liability companies under those enactments. At the time of the rendering of a different decision in the court below, the *New York Times* called attention to the judgment as an instance of "actual and substantial justice enforced by British Courts without regard to any narrow technicalities that would seem to interfere with such justice." The writer of an interesting editorial in a recent issue of that journal expresses the opinion that this tribute of praise was "premature." He can "recall no single American case in which a deliberate scheme for seizing assets and avoiding payment has so completely succeeded in this country," and he observes that "if this abuse be not corrected 'limited liability' under English law must be changed to 'unlimited authority to cheat.'" While such a criticism has the value which belongs to protest and expostulation, it is not as helpful as it would be if it had undertaken to dispose of the reasons advanced by the House of Lords for the decision and to suggest a more satisfactory line along which future development might take place. Finally, it seems to the writer that something has been lost by the failure of the courts to face a problem which is believed to be by far the most important of those which obstruct the path of the student of corporation law. The problem concerns our common law tendency to undertake the

¹ The House of Lords, in so deciding, reversed the decision of the Court of Appeal as reported in L. R. Ch. [1895] 323. This case will be discussed in a sequel to the present article.

adjustment of the relations between corporations and the state in suits between the corporations and private citizens. If a corporation is sued upon its contract, instead of treating the case as if it arose between individuals, we complicate the question of rights under the contract by raising the inquiry as to the corporate power of the corporation to make such an agreement as that which the court is asked to enforce. Why? "Because public policy demands that corporate activity shall be confined within well-defined limits." If this is the dictum of public policy, why subject the unfortunate individual who has contracted with the corporation to the trouble and loss incident to a vindication in his suit of the rights of an outraged public? If the state really has a restriction which it is important to enforce, why not deal with the corporation directly in a proceeding instituted for the very purpose? The law of *ultra vires* would then become exclusively a branch of public law, and *ultra vires* cases would be, as they ought to be, cases in which the state is a party and the corporation a defendant. We are gradually coming to the conclusion that the business of supervising corporations and their operations is primarily a legislative and executive matter and not a judicial one. We are electing boards of railroad commissioners. We are creating insurance departments with insurance commissioners to preside over them. We have banking departments and examiners to exercise visitatorial functions. Why not carry out this excellent modern development to its legitimate conclusion and suffer the question of abuse of corporate power to be raised only in proceedings instituted by the state at the instance of the appropriate officer? Undoubtedly, the economic as well as the legal tendency is in this direction. The discussion of the limits of corporate power in suits to which individuals are parties has not been on the whole a creditable chapter in the development of our jurisprudence.

Not only in regard to the exercise of corporate power but also as respects questions of irregularity of organization, this great problem of the policy of the state is constantly presenting itself for solution. Why complicate the litigation to which John Doe is a party by discussing the difficult ques-

tion whether or not his adversary, the corporation, has satisfactorily discharged its duties to the state? If John Doe dealt with the corporation as such, let us decide the case upon the assumption that we have before us a corporation *de jure*. Let us not say with some courts that John Doe is "estopped to deny that his adversary is a corporation." In order that good may come, we must not do the very serious evil, which is involved in using the term "estoppel" with reference to a case from which certain necessary elements of an estoppel are absent. Let us rather be bold enough to recognize that commercial necessity has crystallized into a rule of law, and that when John Doe enters into a contract with those who are trading under corporate form, it will be taken to be a term of his contract that the associates shall be held to a limited liability only. If it is objected that in this way irregular bodies will be spawned upon the public and that individuals without a charter and freed from the burdens of corporate taxation will be enabled to claim the benefit of limited liability, the answer is obviously a simple one. Make the laws relating to the formation of corporations as strict as you please. Place as many safe-guards as you will around the exercise of corporate franchises. Punish the usurpation of corporate power without a charter as severely as the exigencies of the situation demand. Do not rest content with a judgment of ouster. If necessary, subject to fine and imprisonment those who attempt to rob the state of a portion of its prerogative. But do not work injustice to John Doe or to the associates with whom he has gone to law, by obscuring the issues raised between them through the introduction into the litigation of a consideration of the relation between the associates and the state.

In the following pages it is proposed briefly to summarize the answers given by the courts to the problems of irregular incorporation mentioned above. A subsequent paper will be devoted to an attempt to exhibit the operation of the suggested theory, which, in effect, banishes the learning of *de facto* corporations from the realm of private litigation.

I.

A SURVEY OF THE DECISIONS.

If we look into the books we find that problems of irregular organization have grouped themselves, roughly, into four classes: (1) Cases in which associates are resisting a claim preferred against them as partners; (2) Cases in which the alleged corporation, or one of its members, is seeking to escape liability by setting up a defect in organization; (3) Cases in which a defendant is seeking to escape liability to a corporation by setting up irregularities in its organization; (4) Cases in which the question is whether irregularities in the organization of joint-stock companies will subject the associates to general partnership liability.

1. *Cases in which associates are resisting a claim preferred against them as partners.*

The exemption from general partnership liability may be claimed either (a) in virtue of a limitation imposed by contract, or (b) in virtue of a charter obtained by the associates *after* their business dealings with the plaintiff had begun, or (c) in virtue of a charter obtained *before* the cause of action sued upon arose.

(a.) B., C. and D. are general partners. They contract a debt to A., A. agreeing to look only to the partnership property in satisfaction of his claim. In such a case the limitation will be held valid and A. will have no right of recourse to the separate property of the associates.¹

(b.) Where the charter is obtained after the associates have begun business dealings with the plaintiff, it may be that the debt in suit was contracted pending an unexecuted intention to become incorporated or it may have been contracted after the granting of the charter. In the latter case the result may be affected by the regularity or irregularity of organization under the charter.

B., C. and D. associate themselves together with the intention of obtaining a charter. They begin business and contract a debt to A. Afterwards the charter is obtained, but A. sues

¹ *Brown v. Slate Co.*, 134 Mass. 590, 1883. See also *Lindley on Companies*, 246, and cases there cited.

one or more of the associates to enforce a general partnership liability. Judgment for A.¹

B., C. and D. engage in business as general partners. A. deals with them as such, giving them credit and receiving payment from time to time. The associates procure a charter of incorporation and regularly organize thereunder. Afterwards a debt is contracted to A., who sues B., C. and D. as partners. According to a dictum in *Martin v. Fowell*, *supra*, A. cannot recover if he had actual notice of the incorporation. Otherwise he can. *Quare*, upon the theory of notice, whether compliance with the requirements of a general corporation law is not constructive notice, in all jurisdictions in which advertisement and recording are essential?

B., C. and D. engage in business as general partners. A. deals with them as such, giving them credit and receiving payment from time to time. The associates procure a charter of incorporation and irregularly organize thereunder. Afterwards a debt is contracted to A. who sues B., C. and D. as partners. If, in spite of the irregularities, there is a law under which incorporation might be effected, a *bona fide* attempt to organize under that law and a user of its privileges, the organization will be treated as a *de facto* corporation and A. cannot recover.²

(c.) Where the debt in suit was contracted after the obtaining of a charter and the plaintiff subsequently discovers irregularities in the organization, the question arises whether he can treat the charter as a nullity and hold the defendants liable as general partners. In such cases it may be that the charter was granted by special act or that organization was sought to be effected under a general law. In either case it may be that no law is proved to exist under which organization could be effected, or that the law is unconstitutional, or that the organization under the law has been defective and has not been followed by user, or that the organization, though defective, has been followed by user.

¹ *Martin v. Fowell*, 79 Mo. 401, 1883; *Eliot v. Himrod*, 108 Pa. 369, 1885 (*dictum*).

² *Eliot v. Himrod*, *supra* (*dictum*). The theory of *de facto* corporations will be discussed presently.

B., C. and D. obtain a special act of incorporation. There is a defect in the act or in the organization under it, or both. A. deals with the association after organization. He subsequently discovers the irregularity and sues B., C. and D. as partners. He cannot recover. The reason for the decision is thus stated by Parsons: ¹ "A *de facto* is an illegal corporation, because the incorporation was not effected according to law. The color of authority for the existence of such a corporation is derived from tradition. When the franchise was a direct grant made by the Executive or Legislative department, the charter was deemed the act of a co-ordinate branch of the Government and, in deference to the Political Power, was treated as a judgment which could not be impeached collaterally."

B., C. and D., attempt to organize under a general law, but fail to comply with certain formalities. They do business as a corporation and contract a debt to A., who seeks to enforce partnership liability against them. A. is entitled to recover.² This decision is thus explained by Parsons³:—"The prohibition by Constitution of special grants and the statutory regulation of incorporation has made it subject to judicial cognizance and has changed the character of incorporation from a Public to a private transaction. The incorporation has become and is now the act of the incorporators. In cases of incorporation under general statutes the Executive department of the Government is powerless to prevent the incorporation. Its action is purely ministerial . . . The corporator, like the special partner, claims exemption from the full measure of the liability which, by the common law, attaches to his acts . . . In each case immunity must be proved, for it is a universal principle that he who claims a special privilege must make out the exception upon which he relies. The burden of proof rests upon him and is the condition of his right. If the law has prescribed the requisites, nothing short of compliance with the requisites of the law will be sufficient to establish the exceptional privileges."

¹ Partnership (Jan. 25 Parsons) p. 24.

² Paterson v. Arnold, 45 Pa. 420, 1863.

³ P. 24.

B., C. and D. attempt to organize as before. The organization under the general law is defective and A., a subsequent creditor, sues the associates as partners. A. cannot recover.¹ The reason given for the decision is the practical inconvenience of subjecting stockholders to the risk of partnership liability. If it is objected² that hardship proves too much, since at the common law a partner was charged even if he took no part in the business, the answer is that the rule of partnership is not adapted to the modern form of commercial and industrial activity of which the corporation is a type.

B., C. and D. go through the forms of corporate organization and do business as a corporation. At the end of twenty-one years, A., a creditor, sues the associates as partners and calls upon them to prove their charter as a condition of immunity from personal liability. The lapse of time relieves the associates from the obligation of proving their charter.³

B., C. and D. do business in corporate form and hold themselves out as a corporation. A. deals with the organization, which becomes indebted to him and he brings suit against B., C. and D. as partners. A. fails to prove that the defendants are a partnership by contract or by holding out. It is conceded, however, that they have traded together as co-proprietary of the property and business. They point to no general law under which they could be incorporated and prove no special act erecting them into a corporation. Upon this state of the evidence, judgment is entered for the defendants.⁴ *Querr*, in view of this decision, as to what becomes of the common law theory that the burden rests upon joint traders to prove the existence of the privilege in virtue of which they claim immunity from personal liability?⁵

¹ *Cochran v. Arnold*, 58 Pa. 399, 1866, (overruling *Paterson v. Arnold*, *supra*.)

² *Parsons*, P. 24.

³ *White v. State*, 69 Ind. 273, 1879 (*semble*). This was a criminal proceeding for a trespass committed upon land held in the corporate name. The defence was that the so-called corporation had no valid charter. The court was of opinion that after the lapse of twenty-five years the question of corporate existence could not be raised except by the State.

⁴ *Hallstead's Appeal*, 157 Pa. 59, 1893.

⁵ See *Luckombe v. Ashton*, 2 Foa. & Fin. 705; *Greenwood's Case*, 3 G. M. & G. 450.

B., C. and D. organize a corporation under a law which A., a subsequent creditor, seeks to have declared unconstitutional. The statute is pronounced unconstitutional, and A. is permitted to hold the associates liable as general partners.¹

B., C. and D. irregularly organize under a valid law. A. deals with them as a corporation, but subsequently sues them as individuals. Provided that there has been user and that the irregularity did not occur with reference to an essential prescription of the statute, A. is held not to be entitled to recover. What statutory prescriptions are and what are not essential is often a difficult and disputable question of fact. What constitutes user in a particular case is also a question likely to give trouble.²

Provided the irregularity is not "so great as to be fatal" and provided there has been user, the denial of A.'s right to recover from the associates as partners is based upon different grounds in different jurisdictions. In Pennsylvania and in many other States, the basis of the decision was, at first, the hardship which would result from any other rule.³ In a Massachusetts case, decided in 1851, the doctrine that the associates are liable as partners was said to be "quite novel and somewhat startling."⁴ Morawetz argues that if incorporators are charged as partners in a *de facto* corporation, the members of a *de jure* corporation must also be charged as partners as respects its *ultra vires* acts. Parsons answers that those agents of a corporation who unite in making or authorizing an *ultra vires* contract are personally liable, but that the other members of the corporation are not liable, because, on principles of agency, no corporate obligation is created. When a tort is not incident to the business defined by the charter, it stands upon the footing

¹ *Harriman v. Southam*, 16 Ind. 190, 1861 (*semble*); *Heaton v. Railroad Co.*, 16 Ind. 275, 1861 (*semble*). The theory of such cases is that where power is conferred by statute the plaintiff is estopped by his contract from raising the question of the regularity of its exercise. *Aliter* where the statute, being invalid, confers no power.

² See, for example, *Methodist Church v. Pickett*, 19 New York, 482, 1859; *Railroad Company v. Cary*, 26 New York, 75, 1862—especially the dissenting opinion of Allen, J.; and *Kaiser v. Bank*, 56 Iowa, 104, 1881.

³ *Cochran v. Arnold*, *supra*.

⁴ Bigelow, J., in *Fay v. Noble*, 7 Cushing, 188.

of an *ultra vires* contract. If it is incident to the business, the corporation is charged, but the tortfeasor is subject to an ultimate liability to reimburse the corporation. "The abuse by the agent of his authority charges the principal because the authority exists. The act of a person who has no authority charges him because he is a principal." In New Jersey and elsewhere A. is said to be *estopped* to deny that B., C. and D. are a corporation. "The company was a corporation *de facto* and the plaintiffs who contracted with it cannot be permitted to deny the legality of its existence. The State alone can call that in question."¹ This seems to be a sound conclusion, but it is difficult to find in the case the elements of an estoppel. Since in such a case, it is the associates who are alleging the estoppel (if any exists), it is sometimes argued that knowledge of the existence of the charter on the part of the plaintiff is essential to the validity of the defence. In the absence of proof of any such knowledge the Supreme Court of Pennsylvania have said of a plaintiff that he was amply justified in dealing with the associates as partners, and he was, therefore, entitled to hold them liable as such. This was said in a case in which an essential prescription of the corporation act (recording of the charter) had been disregarded; but the court remarked "it may be conceded that had plaintiff dealt with defendants as a corporation, he would have been estopped from claiming against them in any other capacity, even though they failed to record their charter."²

When we glance back over the cases which range themselves in the first of the classes under discussion, we perceive that associates who are sued as partners may assert an immunity from individual liability if they can point to an express contract by which the plaintiff has agreed to confine his right of recourse to the common property or fund. We further perceive that the associates (in the absence of any express contract) can successfully assert this immunity wherever it appears that the associates held themselves out as a corporation and

¹ *Stout v. Zulick*, 48 N. J. Law, 599, 1886.

² *Guckert v. Harke*, 159 Pa. 303, 1893.

dealt with the plaintiff on that basis. This last proposition, however, must be qualified by the statement that in most jurisdictions the burden rests upon the associates to show the existence of a valid law under which they might be incorporated and a *bona fide* assumption and exercise of corporate privileges, as if in virtue of such incorporation. The difficulty and confusion which exist in the cases arise chiefly from the impossibility of making satisfactory generalizations in regard to what constitutes a colorable compliance with statutory requirements and what amounts to a user of corporate privileges. If it were not for these troublesome modifications it might be said that, as between the parties to an ordinary commercial transaction, the law will recognize the possibility of "incorporation by conduct"—working out the rights and liabilities of all private parties in interest as if no vexed question remained to be settled between the associates and the state. The most weighty reason assigned for insisting upon the preservation of the "troublesome modifications" above referred to, is the reason that in this way alone can safeguards and restrictions be placed upon the exercise of the valuable franchises and privileges which are in the gift of the state. The validity of this reason must be considered hereafter.

2. *Cases in which the alleged corporation or one of its members is seeking to escape liability by setting up a defect in organization.*

Cases belonging to this class may be grouped under two subdivisions; (a) cases in which the corporation is named as defendant in the suit, and (b) those in which an individual is named as defendant, his liability to the plaintiff depending upon his membership in the corporation in question.

(a) A. brought suit against B., an alleged corporation, upon certain promissory notes purporting to be the notes of B. B.'s defence was that there was a material and deliberate misstatement of fact in the recorded certificate of organization required by the general law, that the legal prescription in respect to publication had not been complied with, and that, in taking its name, B. had violated another provision of the act by adopting a name identical with that of a then

existing corporation. Judgment for A. Of the first defence the court said that B. was estopped by the record; of the second, it was observed that "however this omission might have affected the corporation had they been plaintiffs, . . . we think the corporation cannot set it up as a defect in their organization to defeat a recovery against them;" and of the third, it was remarked that, as regards the creditors of the company, an omission to comply with the terms of the statute would furnish no defence. "Objections like these are certainly not to be favored when made by a company holding themselves out as a corporation and contracting liabilities as such."¹

(b) A. brought an action of contract against the X. Co. The defendant was defaulted, and B. and others were summoned as stockholders in pursuance of certain provisions of the law imposing upon the stockholders of manufacturing corporations a liability for the corporate debts. It was contended on behalf of B. that the X. Co. had no legal existence inasmuch as no articles of agreement as required by the statute had ever been entered into. Judgment for B. "It is not a case of defective organization under a charter or act of incorporation nor of erroneous proceedings after the necessary steps were taken in the assumption of corporate powers, but there is an absolute want of proof that any corporation was ever called into being which had the power of contracting debts or of rendering persons liable therefor as stockholders."²

The X. Co., alleged to have been incorporated under an act for the incorporation of ocean steamship companies, gave promissory notes to A. Subsequently, B. became a stockholder in the company. Thereafter A. recovered judgment upon the notes in a suit against X., but failed to obtain satisfaction out of the corporate treasury. He then sought to enforce a statutory liability against B. to an amount equal to the stock held by him. B.'s defence was that 10 per cent. of the capital stock was not paid in, although the act required such payment. The X. Co. had elected officers, opened an

¹ *Dosley v. Cheshire Glass Co.*, 15 Gray, 494, 1860.

² *Utley v. Union Tool Co.*, 11 Gray, 139, 1858.

office and had gone into actual operation as a corporation. Judgment for A. The Court reasoned that if A. had broken his contract and had been sued by the corporation, a defence based upon the non-existence of the corporation would have been sufficiently answered by a production of the certificate which had been filed and proof of user (if not of user alone). "When its corporate existence had been thus established, the plaintiffs would not have been permitted to prove, as a defence for them, the facts relied upon by the defendant for the familiar reason that the right of a corporation to sue cannot be inquired into collaterally."¹

The net result of the cases belonging to this class seems to be that under no circumstances can the corporation set up its own irregularities by way of defence and that in no case can an individual member of a corporation deny the corporate existence where, if he were sued as a general partner, he would be entitled to assert an immunity from individual liability. The former result is simple and satisfactory. A similar remark would be applicable to the latter result if the general conditions of immunity from unlimited liability were simplified in accordance with the suggestions put forth above.

3. *Cases in which a defendant is seeking to escape liability to a corporation plaintiff by setting up irregularities in its organization.*

Cases falling within this class may be separated into two subordinate classes; (a.) cases in which the corporation is suing a stranger to its organization, and (b.) those in which the corporation is suing one of its own members upon a contract of membership or of subscription.

(a.) B. contracted to make and deliver certain coaches to A., an alleged corporation. B. broke his contract and A. brought suit. B.'s defence was that there had been a failure to pay into the corporate treasury 10 per cent. of the capital stock as prescribed by the act. A. produced a regular certificate of incorporation and introduced evidence of user. Judgment for A.²

¹ *Eaton v. Aspinwall*, 19 New York, 119, 1859.

² *Eaton v. Aspinwall*, 19 New York, 119, 1859 (*dictum*).

A. did business under corporate form, and purported to have complied with the requirements of the general law. B. gave A. a promissory note, and after B.'s death A. sued B.'s executor upon the note. Judgment for A. "The plaintiff being a corporation *de facto*, and the defendant having contracted with it as such, the legality of its organization cannot be impeached by him when sued upon his contract."¹

(b.) A., a religious corporation, sued B. to recover a subscription towards rebuilding the plaintiff's church. There was a general law authorizing the incorporation of churches at the date of A.'s organization. At the trial A. gave in evidence a certificate which was claimed by the defendant to be defective, in that it did not show compliance with the terms of the act. A. also introduced evidence for the purpose of establishing user. Judgment for A. "It has been repeatedly held that as against all persons who have entered into contracts with bodies assuming to act in a corporate capacity, it is sufficient for such bodies to show themselves to be corporations *de facto*. This cannot be done by simply showing that they have acted as corporations for any period of time, however long. Two things are necessary to be shown in order to establish the existence of a corporation *de facto*, viz: 1. The existence of a charter or some law under which the corporation with the powers assumed might lawfully be created; and, 2. A user by the party to the suit of the rights claimed to be conferred by such charter or law." A majority of the court were of opinion that defects in the certificate were "only available in behalf of the sovereign power of the State," and that the evidence introduced was sufficient to establish the fact of user. Two of the court, without committing themselves upon either of these points, were of opinion that the certificate was in fact sufficient.²

A. purported to be a corporation organized under a general law. B. became a subscriber to its capital stock and paid an instalment thereon. B. died and his administrator failed to

¹ *Bank v. McDonald*, 130 Mass. 264, 1881. See also *Appleton Insurance Co. v. Jester*, 5 Allen, 446, 1862; *Commissioner of Douglas v. Bolles*, 94 U. S. 104, 1876.

² *Methodist Church v. Pickett*, 19 New York, 482, 1839.

pay subsequent calls. A. sued the administrator, who defended on the ground that A.'s organization was defective in that the affidavit annexed to the articles of association did not contain a certain allegation required by the statute. Judgment for A. A majority of the court concurred in an opinion which contained this language: "I am of opinion that under this and similar general acts for the formation of corporations, if the papers filed, by which the corporation is sought to be created are colorable, but so defective that in a proceeding upon the part of the State against it, it would for that reason be dissolved, yet by acts of user under such an organization it becomes a corporation *de facto*, and no advantage can be taken of such defect in its constitution collaterally by any person." Two judges dissented; one expressed no opinion.¹

B. signed an agreement of subscription to the stock of A. The court construed the agreement as a contract to pay the amount of the subscription to a corporation to be thereafter organized and brought into existence. A. sued B. upon the agreement. It appeared that the certificate of incorporation had never been filed in the office of the Secretary of State as required by statute. Judgment for B. "The contract was in legal effect that the defendant would take and pay for the stock subscribed for in case the organization should be perfected and the corporation brought into legal existence and not otherwise." "The filing of the certificate in the office of the Secretary of State is an indispensable pre-requisite to the legal existence of the corporation."²

A survey of the cases belonging to this class seems to indicate that in almost every instance the corporation will be permitted to recover if it has a *de facto* existence. Here, again, we are met with the difficulty of determining in a given case what amounts to colorable compliance with the provisions of a statute and what amounts to user. The exceptional case, represented in the above outline by *Indianapolis Furnace Co. v. Herkimer*, is the case in which the formation of a corporation is a condition of the defendant's liability. In such a case

¹ *Buffalo R. R. Co. v. Carey*, 26 New York, 73, 1862.

² *Indianapolis Furnace Co. v. Herkimer*, 46 Indiana, 142, 1874.

there must be a regular and valid organization or the defendant will never be liable. The reason given is that under such circumstances "the rule of estoppel does not apply," as it would in case of a contract with an existing corporation. It has been seen that, even in the case of an existing corporation, the elements of estoppel are lacking in such a transaction, and, therefore, the reason assigned in cases of the kind under consideration is peculiarly unsatisfactory.

4. *Cases in which the question is whether irregularities in the organisation of joint stock companies will subject the associates to general partnership liability.*

In view of the fact that statutes have been passed in a multitude of jurisdictions authorizing the formation of joint stock companies with limited liability, the question was certain to arise as to whether a stockholder in case of irregular organization could set up the defence that the company had acquired a *de facto* existence. On looking into the books, we find that this question was definitely raised in at least one case and that the court answered it in the negative. The writer has not found any extended discussion of the principles which should underlie such a decision. It might be argued that, in the case of the corporation, the test of its existence is the creation of a legal entity by the state, whereas in the case of a joint-stock company, there is no entity separate and apart from the members that compose the association. On the basis of this distinction, it might be contended that where, in consequence of the acts of the incorporators, a plaintiff has shown his willingness to make a contract with the entity, he can never recover on that contract against any one but the entity—which, for the purposes of private litigation, will be taken to exist, although its existence might be disputed by the state. On the other hand, in the case of the joint-stock company, it might be said the plaintiff has made no contract with an entity, but has contracted directly with the individuals who compose the company, although, for convenience, they have acted with a common name. In this view, the plaintiff would be entitled to enforce against them whatever liability attaches by law to contracts made by them—and this liability is unlimited liabil-

ity, unless the members have satisfied the conditions upon which immunity is offered by the State. It would follow that there is no room for the conception of *de facto* existence in the case of a joint-stock company, because, even when the "company" exists *de jure*, it has no existence apart from the members which compose it. This argument is somewhat weakened by the consideration that, in equity, the civil law theory is universally followed to the extent that, in the case of the ordinary partnership, the "firm" is treated as an entity distinct from its members.¹ This conception of the firm is gaining ground even in the courts of common law,² and in proportion to the definiteness with which it is accepted, the difficulty of making a theoretical distinction between the corporation and the joint-stock company steadily increases. The explanation above suggested, however, is probably a correct explanation from the historical point of view. Whether any useful purpose is subserved by maintaining a distinction between joint-stock companies and corporations is a question which seems to be least open to discussion. If, in the onward sweep of legal development, the distinction is obliterated, it seems to be quite certain that the results of irregular organization in the case of joint-stock companies will be assimilated to the results reached in the case of corporations, and not *vice versa*.

The case referred to as deciding that there can be no such thing as a *de facto* joint stock company is *Eliot v. Himrod*.³ In this case A. brought suit on two notes given by B. and C. for money borrowed. To defeat recovery, B. and C. alleged that prior to the giving of the notes they had formed a partnership association or joint-stock company under the Pennsylvania Act of Legislature of June 2, 1874. It appeared that there had been a failure on the part of B. and C. to comply with the requirements of the statute in certain essential particulars. They had, however, conducted the business for a considerable period of time and they contended that the

¹ Jessel, M. R., in *Pooley v. Driver*, 5 Ch. D. 458, 476, 1877.

² Brewer, J., in *Cross v. Burlington National Bank*, 17 Kan. 336, 340, 1876; Barret, J., in *Walker v. Wait*, 50 Vt. 668, 1878; Cooley, J., in *Robertson v. Corsett*, 39 Mich. 777, 784, 1878.

³ 108 Pa. 569, 1883.

existence of the partnership association could not therefore be inquired into collaterally. "The formation of a limited partnership," said the court, "is materially different from the creation of a corporation. Such association is treated in the statute as a partnership, which, upon the performance of certain acts, shall possess specified rights and immunities. In contemplation that the association may consist of many members, for convenience it is clothed with many of the features and powers of a corporation, such as the right to sue and be sued, grant and receive, in the association name. But no man can purchase the interest of a member and participate in the subsequent business, unless by a vote of the majority of the members in number and value of their interests. No charter is granted to the persons who record their statement. When they are sued for debt and claim immunity founded on such statement, it is competent for the plaintiff either to point to a fatal defect on its face, or to prove that an essential requisite, though formally stated, is falsely stated."¹ It will be perceived that the court here points to the *delectus personarum* as distinguishing the joint-stock company from the corporation. There have been, however, corporations the shares of which were not generally transferrable and joint-stock companies where the *delectus personarum* did not exist.

We have now completed our survey of typical decisions upon the subject of irregular organization. We find them complicated not only by the existence of the distinction, just discussed, between corporations and joint-stock companies, but by the presence of the vexed question as to what constitutes colorable compliance with statutory requirements and what constitutes user of corporate privileges. We notice a

¹ The scope of this article does not include a discussion of the interpretation placed by the courts upon the statutes which exist in several States authorizing the creation of limited or special partnerships in which one or more of the members is liable only to the extent of his contribution. Such a statute is the Pennsylvania Act of March 21, 1836. The necessity of strict compliance with the terms of this statute has been emphasized in a series of cases in the Supreme Court of Pennsylvania, culminating in the somewhat startling decisions in *Fourth Street National Bank v. Whitaker*, 170 Pa. 297, 1895, and *Blumenthal Bros. & Co. v. Whitaker*, 170 Pa. 309, 1895.

marked tendency, in the case of alleged corporations, to confine the plaintiff in his recovery to the corporate fund and, where the corporation is suing, to preclude the defendant from taking refuge behind an irregularity in the plaintiff's organization. Have the limits of the tendency been reached? Can the courts safely go farther than they have gone in this direction? Is there a tenable theory upon which the difficulties which we now experience may be eliminated from private litigation? It is proposed to attempt to answer these questions in a subsequent article.

George Wharton Pepper.

Philadelphia, January 1, 1899.

MINIMUM ROYALTIES.

On the first day of April, 1882, one E. A. Timlin leased to Thos. Brown and J. L. Hunter a tract in Clarion County for a period of ten years. In the words of the instrument, the tract was leased to the said Brown and Hunter "for the purpose of mining, digging and excavating the coal contained thereon." The lessees agreed "to pay as royalty for coal the sum of one-half cent per bushel for all coal taken from said lease; the said royalty to be paid monthly, each and every month." Further, the lessees agreed "to take out at least ten thousand bushels of coal each and every year, and as much more as they choose." Failing to get out ten thousand bushels, "they agree to pay a royalty on ten thousand bushels each and every year." If the lessees do not fulfil the conditions of the lease, it is to be void, and Timlin may re-enter, etc. In accordance with the lease, coal was mined and royalty paid up to April 1, 1889, at which time the coal had run down to such small proportions as to be unprofitable to work, and no more royalty was paid. Timlin sued in 1892, after the expiration of the lease, to recover the royalties for the past three years. Plaintiff having succeeded in the court below, the defendants appealed, and the Supreme Court affirmed the judgment: *Timlin v. Brown*, 158 Pa. 606.

On April 1, 1875, Sarah Steeley *et al.*, leased to Abraham Boyer "for the purpose of carrying on the mining of iron ore, all the timber land" of the parties of the first part, situated, etc. The lessee was given "the exclusive right to dig for, raise, and take away iron ore, and (he,) shall continue to work during the term of fifteen years from the date hereof." The lessee agrees to pay to the lessor, "the sum of sixty cents for every ton of iron ore sold from said premises during said term, to be paid monthly, but the amount to be paid to the said first party shall in no year be less than four hundred dollars, to be paid within the year respectively. But in case the second party should suspend the work for a time or should not mine and sell iron ore in any year sufficient to make the annual sum

due therefrom to the first party four hundred dollars, in such case however, the said second party shall pay the first party the said annual sum of four hundred dollars, and said second party shall have the right to take out and sell iron ore at a future time to make up for the money paid out as aforesaid for ore in advance, . . . but no iron ore shall be taken out after the expiration of this lease for money advanced and no money advanced as aforesaid shall ever be refunded." Abraham Boyer on Sept. 1, 1876, assigned his leasehold to Kate Boyer, and she assigned it to Henry Fulmer. In the assignment to Fulmer, it was provided as follows: "And he (Fulmer) also agrees to pay to the said Catharine Boyer, his heirs and assigns, the additional sum of seventeen and one-half cents for each and every gross ton of iron ore mined and taken away from said premises, to be paid monthly to said Catharine Boyer, said payments to be between the last day of the month and the fifteenth day of the following month" and further, "the said Henry Fulmer shall mine and take away and pay for not less than one thousand tons of iron ore in each and every year. He shall pay to said Catharine Boyer her royalty of seventeen and one-half cents per ton on one thousand tons per annum whether he mines that amount or not." If Fulmer fails to mine and pay for this amount, the assignment to be void, etc.

Fulmer worked the mine for three years; and thus, the iron being practically exhausted, he ceased operation, and paid no more royalty. Mrs. Boyer sued to recover royalty payable after the work had been stopped. She succeeded in the court below, Fulmer appealed, and the judgment was reversed, Mr. Justice Mitchell dissenting: *Boyer v. Fulmer*, 176 Pa. 282.

Timlin v. Brown was not overruled, and is, therefore, still law. I think counsel would find difficulty in advising a client in a similar case, for the points of difference between *Timlin v. Brown* and *Boyer v. Fulmer* do not "jump at the eyes," as the French say. I propose to examine them carefully to see where the real distinction, if any, is to be found. Both were cases wherein the parties to whom royalty

was alleged to be due sued to recover it. Both were cases wherein no royalty had been paid during the period covered by the suit.

In *Timlin v. Brown*, the particular covenant was: "In case the said Brown and Hunter fails (*sic*) to get out the amount before stated, they agree to pay royalty on ten thousand bushels each and every year."

In *Boyer v. Fulmer*, the particular covenant was: "He shall pay the said Catharine Boyer her royalty of seventeen and one-half cents per ton on one thousand tons per annum whether he mines that amount or not."

In both cases the defence was that there had been a practical exhaustion of the mineral before the payment of royalty had ceased.

The reasons for the decision, in *Timlin v. Brown*, given by the court, speaking through Dean, J., are.

1. The lease constituted a sale of the coal in place at one-half cent per bushel with a right to a term of ten years in which to mine and remove it. If there were more than one hundred thousand bushels mined in ten years, one-half cent per bushel was to be paid on the excess. That is, it was a sale of all the coal in place at a minimum price of five hundred dollars.

From the fact that there had been a prior contract with Brown at a less royalty, for which the one sued on was substituted, and the additional fact that Brown was already working an adjoining tract, the court draws the conclusion that neither party doubted that coal existed under the tract leased,
—so

2. This is not a case of mutual mistake—and

3. The defendants having contracted to pay could not escape because the mines gave out.

In *Boyer v. Fulmer*, the court speaking through Green, J., gave as reasons for its judgment:

1. The agreements did not constitute a sale of the coal in place—the tract leased was timber land and arable land under which the existence of ore was a matter of conjecture—so

2. The defendants' covenant to pay whether he mined or

not was merely a covenant to pay for iron which he could have mined if he had chosen.

One day some years ago, when the late Judge Ludlow was presiding in the Court of Common Pleas No. 3, Philadelphia, a young gentleman came into court just as the judge had completed a call of the trial list. He said to the court, "If your Honor pleases, the case of *Snooks v. Brown* may be stricken from the list." The judge ran his eye down the list, and looking up, said: "Did you say Snooks and Brown?" "No, sir; *Snooks versus Brown*."

I must honestly confess that I can see very little more distinction between these two cases. The question of the amount of uncertainty in the minds of parties to a mining lease as to the existence of the mineral at all in paying quantities is so impossible of determination that it is a most unsatisfactory test by which to adjudge their rights and duties. It may safely be said that no lease is ever entered into without at least very strong belief in the existence of the mineral—no one would execute a mining lease for coal in Philadelphia County, for example—so that it must be assumed that as reasonable beings and business men it is their confident expectation, however mistaken, that the terms of a lease can be practically carried out. And to say that because the reasons for the belief may have been stronger in the one case than in the other, the obligation of the contract is not the same, is against common sense. Besides, admittedly the amount of coal or iron in place is not positively ascertainable beforehand—so that there is always uncertainty as to just how much will be available. Now, in Case A. there are strong reasons for believing in the existence of the mineral. In Case B. the reasons are still stronger. Yet in both cases the mineral gives out, contrary to expectations. Is the man who deliberately entered into a contract in Case A. to be excused from its performance because he did not wait for stronger reasons before he did so, while the man in Case B. who did have stronger reasons, is held to a strict accountability? Common sense, legal principles, revolt against any such doctrine. The two cases which we have been analyzing are absolutely indistin-

guishable upon any recognizable principle—or at least one capable of practical application—and unless a lawyer should be “so skilled in argument, he could divide a hair twixt South and Southwest side,” he could find it impossible to advise if both are to stand. We are now brought face to face with the question, what is and should be the law? Let us see whether *Timlin v. Brown* or *Boyer v. Fulmer* is most in accord with the weight of authority?

The trend of the decisions, which are not numerous in Pennsylvania, has been to relieve the lessees from payment of royalty for minerals which have no existence. The case immediately prior to *Timlin v. Brown* was *McCahan v. Wharton*, 121 Pa. 424. In that case there had been a lease giving the exclusive right to “prospect for, dig, mine and ship iron ore,” and “just as soon as iron ore is found in sufficient quantities to justify the shipping of the same, then the parties of the second part agree to work the said mines to their utmost capacity,” and they agree “to pay the sum of fifty cents per ton for each and every ton of iron ore mined and shipped,” and “in case sufficient iron ore be found, that, then, the mining and shipments of iron ore shall not be less than twenty-five hundred tons per year; and that the royalty, if sufficient iron ore be found, shall in no event be less than twelve hundred dollars for each and every year.” “It is further understood that if the parties of the second part do not quit possession of said premises, and surrender and give up all interest, they may have in this lease, on or before the first day of July, 1884, the very act of their refusing or neglecting to quit possession and surrender the lease is hereby agreed on their part that there is a sufficient quantity of iron ore in said property to pay the royalty of twelve hundred dollars on the first day of February, 1885.”

Suit was brought to recover this royalty due, on February 1, 1885. There was some evidence of a surrender of the lease. But the court said that the agreement as to the effect of remaining in possession after July 1, 1884, only threw upon the defendants the burden of proof that no ore existed, that it was not an absolute agreement to pay royalty whether

or no. What became of the principle of estoppel is not mentioned, but the case is another strong indication that exhaustion or non-existence of minerals is a defence which the courts strive hard to sustain.

Going backward chronologically, we come next to *Muhlenberg v. Henning*, 116 Pa. 138, a leading case. We find there an instrument in which the plaintiff "granted, bargained and sold" to the defendants for five years all the iron ore in a certain tract of fifty acres in Berks Co. The lessees (so called in the instrument) agreed to pay "for every ton . . . mined and taken away . . . the price of thirty-five cents per ton," and further "to raise, mine, carry away and sell at least fifteen hundred tons annually . . . or in default thereof to pay a royalty of five hundred and twenty-five dollars annually." Suit was brought to recover the sum, and an affidavit of defence alleged that in spite of efforts no iron was found of sufficient quality or quantity to enable the defendants to comply with the contract. The court below refused judgment for want of a sufficient affidavit of defence, the plaintiff appealed, but unsuccessfully. Mr. Justice Clark says, in delivering the opinion of the court, that the transaction was a sale of the ore in place, and, as no ore was found, the subject-matter of the contract failed, and the price could not be recovered. He considers it a case of mutual mistake, both parties having supposed that ore existed, and while, under *Harlan v. Lehigh Coal Co.*, 35 Pa. 287, it could not be said that the lessors had warranted the existence of ore, or that its mining would be profitable, and so the lessees could not recover from the lessors the expenses of their vain search, still equity would not permit the recovery of royalty in such a case. And this ruling would seem to be borne out by *Kemble Coal Co. v. Scott*, 15 W. N. C. 220; see also *Johnston v. Cowan*, 59 Pa. 275. The apparent rule, then, both of authority and common sense, is: The lessors do not warrant the existence of the mineral or its quality or profitable working, and the lessees cannot, therefore, recover sums expended in an endeavor to find and work it. And they are bound to use all reasonable effort to perform the contract. But if, in

spite of these efforts, the mineral is insufficient in quantity or quality to be worked so as to pay the royalty, such facts may be shown by the lessees, (upon whom is the burden of proof) in an action for its recovery. *Timlin v. Brown* is hardly reconcilable with this view, but it seems to me to stand alone.

Another most interesting case has been decided very recently. I refer to *Lehigh and Wilkesbarre Coal Co. v. Wright*, 177 Pa. 387. In this case the lessees were plaintiffs, and filed a bill in equity to restrain the lessors from enforcing at law the forfeiture clause of the lease, and also from re-entry under the power of attorney to confess judgment, etc. The material provisions of the lease were: Lessors leased to lessees "all the coal upon and under" the tract "for and until such time as all the merchantable anthracite coal shall have been mined or removed," the lessees to pay twenty-five cents a ton, the "rent or royalty" to be paid quarterly. Section 2 was as follows: "And the said party of the second part, its successors and assigns, whether coal be mined or not, shall pay to the said parties of the first part, their executors, administrators and assigns, in the proportions aforesaid, an annual minimum rental of not less than four thousand dollars, payable in quarterly instalments, . . . and if the said party of the second part, its successors and assigns shall fail in any year to mine coal to amount to the said minimum, which it or they shall have paid, the deficiency may be made up in any subsequent year during the the time of this lease without any payment therefor. And should the breaker of the said party of the second part, its successors or assigns be destroyed by fire or other unavoidable cause, the rent may be postponed for the time which may be necessary to erect a new breaker, not however, to exceed three months." By Section 11, it was agreed that in default of any quarterly payment all the right of the lessees under the lease should be forfeited at the option of the lessors; or they might issue a landlord's covenant and distrains for rent in arrears; or, in case of forfeiture then by authority of a power of attorney thereby given, judgment in ejectment might be confessed and possession taken of the premises.

Up to July, 1888, payments of royalty were regularly made. And, then, the plaintiffs notified defendants that they would pay no more, because the sums already paid more than paid for the coal mined and all that remained in place. It is stated in the opinion of the court that the right to timber or other material in the surface was granted to plaintiff along with the coal. So that, apparently, they sought to remain in possession without further payment and take their own time to remove the balance of the coal. In the opinion of the Master several years would be necessary to remove the coal, using reasonable diligence, and, as it had all been paid for, the forfeiture of the lease before its removal would be unconscionable. But the Supreme Court, agreeing with the court below, and disagreeing with the Master, held, in an opinion by Mr. Justice Dean, that the company could not remain and exercise its surface rights without paying the annual rental.

Since the whole amount which the plaintiffs would have paid had they taken out every pound of coal had been paid; and since several years were stated to be reasonably necessary to take out what remained, it is difficult not to agree thoroughly with the dissenting opinions of Green and Williams, JJ. No cases are cited in the opinion of the court, but a startling allusion to them is made in these words: "It is useless to go over them, because to be in point, they should be *in verbis ipsissimis* concerning the same subject and parties in the same situation." If cases to be in point must be "*in verbis ipsissimis*," counsel need hardly be at pains to search for precedents; they will not be likely to find any.

It is much to be regretted that there is no clear light by which to guide one's footsteps in cases of this kind. The only solution of the difficulty for the future, which is at all obvious, is greater care and more distinct and unambiguous expression in the preparation of mining leases. It may not be an easy task to draw an instrument which will be satisfactory to both parties and unmistakably express their views—but surely in this age of business-like methods, it ought not to be possible for questions such as we have been discussing, to arise, especially after repeated warnings like these cases. I remember

upon one occasion hearing the learned and distinguished senior counsel for the appellees in *Lehigh Co. v. Wright*, remark, *arguendo*, that the days were past when courts sat for the purpose of perpetrating injustice under the forms of law—that Grose, J., and his contemporaries were never better pleased than when their ingenuity had discovered some way of legally inflicting undeserved loss upon some unfortunate suitor, but that, happily, we had changed all that! After *Lehigh Co. v. Wright*, one does not feel so sure.

Lucius S. Landreth.

Philadelphia, January 1, 1897.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS FOR DECEMBER.

In *The Mariposa*, [1896] P. 273, the defendants' steamship, three days out from Montreal for Liverpool, stranded on the coast of Labrador. The master landed the passengers and crew, provided them with food and accommodation, and the same day intercepted a passing steamer which, at the request of the master, conveyed the passengers to their destination. The following day a steamer, passing in the opposite direction, at the like request, took off the greater part of the crew, conveyed them to Quebec, and, on the way, telegraphed for assistance to be sent. The defendants' vessel became a total loss, materials worth only £335 being saved. The contract with the passengers provided that the defendants should not be liable "for loss or delay from the act of God . . . perils of the seas, rivers, or navigation . . . or the wrongful act of the company's servants." The owners of the passing steamers brought an action against the defendants for salvage, or, in the alternative, for remuneration for services rendered at request. The defendants tendered £200, which was refused; but Gorell Barnes, J., ruled that the tender must be upheld, as the passengers and crew were not in any danger, so that no life salvage was claimable, and as the defendants were under no obligation to forward the passengers to their destination, the master, in transshipping them, acted as the agent of the passengers, not of the defendants.

The Supreme Court of Georgia has lately decided a very interesting question, holding that while an entry in a bank-book or "pass-book" purporting to show that the owner of the book has credit in a bank for a specified balance is not conclusive or binding upon the bank, yet, when a banker issued and delivered such a book containing an entry of this kind which was *ab initio* false, and when, after this was done, a third person, who had seen the book,

Admiralty,
Life Salvage,
Authority of
Master

Banks and
Banking,
Entry in
Bank-book,
Estoppel to
Deny,
Misrepresentation,
Concurrence

applied to the banker for information as to the genuineness and accuracy of the apparent credit, at the same time disclosing his reasons for making the inquiry, and the banker, while expressly declining to give in terms the information thus sought, did, by concealing the truth, or by other means, induce the inquirer to believe the entry in the book was true and correct, and, in consequence of that belief, to make with the owner of the book a contract by which the inquirer, though exercising due care in the premises, was defrauded and suffered a loss, the banker was, within proper limits, liable in damages to the former on account of that loss, if, under the special circumstances of the case, he was under an obligation to communicate to the inquirer the exact truth of the matter: *James v. Crosthwaite*, 25 S. E. Rep. 754.

The Supreme Court of Tennessee has recently held that under the statute of that state, which provides that loans made by a building association shall be made "in open meeting to the highest bidder," (M. & V. Code Tenn. § 1751,) loans made at a fixed premium by agreement between the borrowers and the association are usurious, if in excess of the legal rate of interest: *McCauley v. Workingman's Bdg. & Loan Assn.*, 37 S. W. Rep. 212; *Post v. Mechanics' Bdg. & Loan Assn.*, 37 S. W. Rep. 216.

In the latter of these cases it was further decided that, in distributing the assets of an insolvent building association, the rights of holders of stock in a series declared through mistake to be matured, when in fact it had not matured, in respect of the assets of the corporation, is the same, in effect and as to results, as that of holders of unmatured stock who have given notice of withdrawal. They share *pro rata* with other stockholders, and are not to be regarded as creditors of the association.

Holders of certificates of full-paid stock issued by a building and loan association, calling for payments of dividends at regular intervals, are not creditors of the association, as distinguished from its other members, since such certificates are not promises to pay under the law merchant; and in case of the insol-

Building
and Loan
Associations,
Premiums,
Usury

Full paid
Stock,
Rights of
holders

veny of the association, the holders of such certificates, are only entitled, like other members, to a share of the assets proportionate to the amount they have paid in : *Towle v. American Building & Loan Assn.*, (Circuit Court, N. D. Illinois,) 75 Fed. Rep. 938.

In a recent case before the Supreme Court of Minnesota, it appeared that the defendant company had issued to one D. a mileage ticket or book, which expressly provided that it was to be used only by D., "whose signature appears on the last page." It also provided that it was subject to the conditions named in the contract, "and made part hereof." One of these conditions was that the ticket was not transferable, and, if presented by any other than the original holder, "whose signature is hereon," the conductor would take it up, and collect full fare. The ticket was never signed by D. The plaintiff purchased it from a broker, and presented it in payment of his fare on one of the defendant's trains. The conductor took it up, and refused to return it to the plaintiff, whereupon the latter refused to pay his fare unless the conductor would return the ticket. The employees of the defendant then attempted to remove the plaintiff from the train, for which he brought suit to recover damages. The trial resulted in a verdict for the defendant, and a new trial was refused. From this the plaintiff appealed; but the order was affirmed, on the grounds (1) that the plaintiff had no right to ride on the ticket, the fact that it was not signed by the original purchaser being immaterial, since, by accepting the ticket, he accepted all the terms and conditions contained therein; (2) that he had no right to refuse to pay his fare, unless the conductor would return the ticket; (3) that even granting that the conductor had no right to take up the ticket, (the majority of the court being nevertheless of opinion that he had that right,) it was the duty of the plaintiff to pay his fare or leave the train, and then pursue his remedy against the defendant for wrongfully withholding the ticket : *Rahilly v. St. Paul & D. Ry. Co.*, 68 N. W. Rep. 853.

Carriers,
Tickets,
Conditions,
Transfer,
Payment of
Fares

According to a decision of the Court of Appeal of England, a beneficial society, whose funds are raised by means of the subscriptions, fines and forfeitures of its members, in order to provide annuities for the widows of its deceased members, without distinction, is a mutual insurance society, and not a charity: *Cunnuck v. Edwards*, [1896] 2 Ch. 679, reversing [1895] 1 Ch. 489, 1895; but in the opinion of Kekewich, J., of the Chancery Division, such a society, whose object is to provide for the relief of members, their widows and children, if "in distressed circumstances," and whose funds are in part raised by voluntary donations and bequests from outsiders, is within the definition of a charity, as laid down in *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A. C. 531, 1891; *In re Buck*, [1896] 2 Ch. 727.

The Court of Appeals of New York, in *Rathbone v. Wirth*, 45 N. E. Rep. 15, has affirmed the decision of the Appellate Division of the Supreme Court in *Rathbone v. Wirth*, 40 N. Y. Suppl. 535, 1896, (see 35 Am. L. REG. N. S. 642,) that the Act of New York of 1896, c. 427, is unconstitutional. That act created a board of four police commissioners for the city of Albany, to be elected by the common council, and provided that not more than two of them should belong to the same political party; that for the purpose of such election, the members of the council attending the meeting should constitute a quorum; that each member of the council should be entitled to vote for not more than two commissioners; that if a vacancy should occur in the board of police commissioners, it should be filled by appointment by the mayor, on the written recommendation of a majority of the members of the common council belonging to the same political party as the commissioner whose office should become vacant, and that no person should be eligible to the office of police commissioner unless he was a member of the political party having the highest or next highest representation in the common council.

Charity,
Beneficial
Society

Constitutional
Law,
Election of
Officers,
Minority
Representation

In a recent case before the Circuit Court for the District of Indiana, Baker, Dist. J., very clearly and succinctly stated the principles upon which the imposition of the penalty for contempt rests, as follows: "Constructive contempts may be distributed into two general classes, namely: First, those wherein the contemptuous acts primarily affect public rights or the due administration of public justice; and, second, those which primarily affect private rights, and only remotely and incidentally affect public rights or public justice. When the contempt consists in the failure or refusal of the party to do or refrain from doing something which he is ordered to do or refrain from doing for the benefit or advantage of the opposite party, the proceeding is not criminal, but is civil, and remedial in its nature. And in this sort of contempt the intention with which the act was committed is immaterial, except in fixing the proper measure of punishment. The injury suffered by the complaining party is neither increased nor diminished, nor in any wise affected, by the state of mind towards the court of the party doing the forbidden act. The breach of the injunction consists in doing or failing to do the thing commanded, and not in the intention with which the act was done." He, therefore, held that as the defendant had been enjoined, at the suit of a water company, from allowing any deleterious substance to escape from its factory, into a river, the fact that it negligently permitted a reservoir, built by it on the bank of the river, to break and discharge its contents into it, was a contempt punishable by fine, or by fine and imprisonment, though there was no wilful purpose to violate the injunction: *Indianapolis Water Co. v. American Strawboard Co.*, 75 Fed. Rep. 972.

According to a recent decision of Vaughan Williams, J., of the Chancery Division of the High Court of Justice of England, when one person is an officer of two corporations his personal knowledge is not necessarily the knowledge of both the corporations. The knowledge which he has acquired as officer of one

Corporations,
Common
Officers,
Imputation of
Knowledge

corporation will not be imputed to the other unless he has some duty imposed on him to communicate his knowledge to the corporation sought to be affected by the notice, and some duty imposed on him by that company to receive the notice; and if the common officer has been guilty of fraud, or even of irregularity, the court will not draw the inference that he has fulfilled these duties: *In re Hampshire Land Co.*, [1896] 2 Ch. 743.

The Supreme Court of the United States has lately held that it has no jurisdiction of a writ of error from the decision of the Circuit Court of Appeals, affirming the judgment of a circuit court rendered in a suit to recover damages for infringement of a copyright, when the plaintiff claims no right under the copyright laws of the United States, but maintains the action wholly upon the right given by the common law: *Press Pub. Co. v. Monroe*, 17 Sup. Ct. Rep. 40.

The Supreme Court of Kansas has partly overruled the dictum in *State v. Hall*, 40 Kans. 338, to the effect that the rule against the trial of an offender for another crime than that for which he has been extradited is applied "in cases of separate jurisdictions, whether the separate jurisdictions are cities, counties, districts, states, or foreign countries," holding that a district court of the county where a felony has been committed has jurisdiction to try the alleged offender, when duly bound over in regular process, though he was originally arrested in another county without warrant and forcibly brought into the county where the crime was committed: *State v. May*, 46 Pac. Rep. 709.

This dictum is correct only as to the case of a regular extradition from a foreign country. In all other cases of surrender, and in all cases of kidnapping or illegal arrest, after the court once gets possession of the accused, it can try him for all the crimes in the calendar: See 35 AM. L. REG. N. S. 782.

The Supreme Court of Tennessee recently passed upon a

very interesting question of law, arising out of a series of transactions which, as the court says, "are certainly unique in character." One Robertson, the owner of certain real estate, executed a deed of it to a fictitious person, and then drew a deed of trust to secure bonds, signed it by that fictitious name, procured a certificate of acknowledgment, had it recorded, and delivered it to the grantee. The property was held under the deed of trust by the grantee; but the purchaser at the sale, one of the creditors of the owner of the land, becoming aware of the irregularity of the transaction, filed a bill charging that the deed was ineffectual to convey title, because there was no such grantee, and that the deed of trust was ineffectual to convey title to the trustee, because it was a forgery. The first contention was upheld, on the ground that a deed to a fictitious person is void, and leaves the title in the grantor; but the second was rejected, and it was held that the title passed, and that the sale under the trust was valid: *Wickl v. Robertson*, 37 S. W. Rep. 274.

The peculiar political situation that developed this fall has given birth to a number of election decisions involving not only new, but very odd and interesting points. Elections. Preparation of Ballot. Some of the most extraordinary of these are to be found in a recent decision by the Supreme Court of Michigan, *Baker v. Board of Election Commissioners of Wayne County*, 68 N. W. Rep. 752. The ballot law of that state, (Laws Mich. 1895, No. 271, § 11.) provides that the state committee of any political party shall adopt a vignette to be painted at the top of the column of the ballot assigned to that party as a distinctive heading thereto. The city charter of Detroit, as amended by the Laws of 1895, No. 468, provides that no vignette shall be painted on any ballot; that the mode of conducting state and county elections shall be in the manner provided for the election of city officers; that the provisions of that act shall govern when applicable, notwithstanding the provisions of the general law, unless the latter shall in terms be declared applicable to city elections;

and that it shall be the duty of the election commissioners of the city to print the ballots for use in the said city in the manner described in the act for the election of city officers. It was contended that this act prevented the use of the vignette on the ballots in the city of Detroit, but it was held that the provision that no vignette should be used applied only to the ballots used for the election of city officers, and not to those used for the state, county and congressional officers.

The ballot act of 1895 also provides, (§ 14.) that, in arranging the ballots, it shall be the duty of the election commissioners of each county to place the ticket of the party having the greatest number of votes within the county at the last preceding election first in the ballot, the other tickets to follow in the regular order of their numerical strength at that election. This provision was held mandatory, and under it, the second place on the ticket belonged to the Democratic party. But it happened that the regularly called Democratic state convention met on the same day and in the same city as the People's party and the Union Silver party. The three conventions entered into an arrangement by which they met as one body, and nominated a fusion ticket, which it was agreed should be called the "Democratic People's Union Silver Ticket," and they also adopted a new and distinctive vignette. In this joint convention, the People's party and the Union Silver party were together accorded the same number of votes as the Democratic party. The chairman of the Democratic state central committee applied for a mandamus to compel the election commissioners to place the ticket so nominated second on the ballot, in the place belonging to the Democratic party; but this was refused, on the ground that that ticket was not the Democratic ticket.

After the nomination of this fusion ticket, a mass meeting composed wholly of Democrats was held, at which presidential electors and candidates for state officers were placed in nomination as a Democratic ticket. This mass meeting was not called or held under the auspices of any previous state organi-

zation ; and the ticket nominated thereat was also refused the second place on the ballot, on the ground that it could not be considered the regular Democratic ticket.

The Supreme Court of Montana has also had before it some very interesting election cases. In one of these, a candidate for district judge was nominated by a certificate signed and filed by the electors of the Silver Republican party in the counties composing the district. The certificate of nomination was filed under the direction of the state and county central committees of the district, and it was sought to place the nominee's name on the official ballot under the head of the Silver Republican party. The relator sued out a writ of injunction to restrain the clerk from so doing, and this writ was made permanent, on the authority of *State v. Rotwitt*, (Mont.) 46 Pac. Rep. 370, 35 Am. L. Reg. N. S. 779, the court holding (1) That the direction of the central committees did not make the nomination a party action, so as to take it out of the rule that a nomination of a regular existing party cannot be made by a certificate of electors ; and (2) That such a nominee could not be placed on the ballot as an independent candidate, since it was apparent that the electors who signed the certificate of nomination intended to nominate him as a Silver Republican, and it would not be presumed that they would have signed a certificate to nominate him as an independent candidate : *State v. Reek*, 46 Pac. Rep. 438 *State v. Rotwitt* was also followed in *State v. Tooker*, (Mont.) 46 Pac. Rep. 530.

The same court, following the rule already announced in several states : *People v. District Court*, 18 Colo. 26, 1892 ; *Shields v. Jacobs*, 88 Mich. 164, 1891 ; *State v. Rival Conventions Allen*, (Neb.) 62 N. W. Rep. 35, 1894 ; *Phelps v. Piper*, (Neb.) 67 N. W. Rep. 755, 1896 ; has decided that it is not the duty of the courts to determine which of two rival conventions, held by opposing factions of the same political party, and each composed of delegates regularly elected to a convention called by the constituted authorities of the party, is entitled to represent the party, by enjoining the county

Nominations,
Certificate of
Electors,
Nomination
by Committee,
Independent
Candidate

clerk from placing the names of the nominees of either convention on the official ballot: *State v. Johnson*, 46 Pac. Rep. 440. It also refused to decide which of two rival conventions, each claiming to be the only regular one of the party, was such in fact, on the ground that the relator had delayed so long that the court could not decide the question before the time when, by law, the official ballot must be printed: *State v. Reck*, 46 Pac. Rep. 442.

This court further holds that a certificate filed with the county clerk, purporting to certify to the nomination of the persons named therein by the county central committee of a party, no convention of which had ever delegated such power to a committee, does not entitle the alleged candidates to a place on the official ballot: *State v. Tooker*, 46 Pac. Rep. 530; and has passed upon two important cases involving the validity of a nominating convention. In the first of these, *State v. Tooker*, *supra*, a suit to enjoin the county clerk from placing on the official ballot the names of certain persons as candidates of the Silver Republican party, under authority of a certificate of nomination purporting to come from a county convention of said party, it appeared that the alleged candidates were nominated at a meeting participated in by less than fifty members of the "Silver Republican Club," which had some four hundred members; that most of the persons nominated at this meeting were not Silver Republicans, but men who had already been nominated by various other parties; that no primaries were held, no delegates chosen, no call for a convention made, nor any notice thereof given, other than information of the club's proceedings, published in a daily paper as news items, and a statement on a banner that the club met every Wednesday night; and that the chairman who presided at the meeting and signed the certificate of nomination did not know till after it was filed that the meeting was a convention, but supposed it was merely a meeting of the club. Under these circumstances, it was held that the meeting was not a party convention, within § 1310 of the Political Code of Montana, defining a convention as "an organized assemblage of electors or delegates representing a political party or prin-

ciple," and authorizing such a convention to nominate candidates for public office; and that the names on the certificate were consequently not entitled to a place on the official ballot.

In the other case, *State v. Johnson*, 46 Pac. Rep. 533, electors who had assembled by personal invitation, and who represented but one-fourth of the precincts in one county, organized as a political party by the election of a chairman and secretary, and the appointment of committees. The assembly then proceeded as a county convention, and nominated a county ticket. The county convention adjourned *sine die*, and the same electors immediately proceeded to hold a state convention. No call for a state convention was ever given; no delegates to the state convention were ever elected by any county convention; no credentials as such were ever given; no notice was attempted to be published of a state gathering of the new party; and no delegates other than those who first assembled, and who sat as a county convention, took part in the proceedings. Upon these facts it was held there had been neither a county nor a state convention with authority to nominate candidates, and the latter were refused a place on the official ballot.

The Supreme Court of California holds that when the last day on which a certificate of nomination can be filed falls on a Sunday or legal holiday, it must, in order to be in time, be filed the day before: *Griffin v. Dingley*, 46 Pac. Rep. 457.

According to the Supreme Court of Kansas, after the hearing and decision of objections to a nomination certificate filed by the proper authority, the further duties of the secretary of state are ministerial only. He has no right to challenge, and the courts have no authority to consider, the motives that may have actuated the nominating convention, and he should certify any proper and requisite matter duly appearing on the nomination certificate: *Breidenthal v. Edwards*, 46 Pac. Rep. 469.

It was decided in the same case, that a vice-presidential candidate, whose name, together with that of his associate

Withdrawal of Candidate presidential candidate, has been certified by authority of a state convention of his party as an addition to the party appellation, and who has not declined the national nomination, nor withdrawn as a candidate in the state, has no right to forbid such use of his name on the electoral ticket nominated by his party in the state, under the section of the ballot law which provides that "any person whose name has been presented as a candidate may cause his name to be withdrawn from nomination by his request in writing," etc.

Injunctions, Conspiracy to Injure Business, Patrolling The Supreme Judicial Court of Massachusetts has recently held, in accordance with the universal current of decision, (unaffected by the oburgations of well-meaning but impractical theorists,) that a continuing injury to property or business may be enjoined, though it be also punishable as a crime; and that consequently the maintenance of a patrol of two men in front of the plaintiff's premises, in furtherance of a conspiracy to prevent, whether by threats and intimidation, or by persuasion and social pressure, any workmen from entering into, or continuing in his employment, will be enjoined, though such workmen are not under contract to work for the plaintiff: *Vegetahn v. Guntner*, 44 N. E. Rep. 1077. Field, C. J., and Holmes, J., dissented.

Life Insurance, Assignment of Policy, Bill to Redeem When a life insurance policy is assigned, payable to the assignee, "as interest may appear," in consideration of his real promise to support the assignor, and to receive from the proceeds of the policy such sums as he might advance for that purpose, the assignor may maintain a bill to redeem the policy, on the failure of the assignee to comply with his agreement, and on repayment of the sums advanced, though the policy has meanwhile been assigned to a third person without qualification: *Bohleber v. Warden*, (Court of Appeals of New York,) 44 N. E. Rep. 1041, reversing 30 N. Y. Suppl. 312.

The House of Lords has recently decided, affirming *Ebbetts v. Conquest*, [1895] 2 Ch. 377. 1895, that when a lease contains covenants to keep the demised premises in repair and to deliver them up in good repair, and a sub-lease is granted containing similar covenants, with notice to the sub-lessee of the original lease, and the lessee brings suit against the sub-lessee for breach of his covenant to keep in repair, it is proper, in assessing the damages, to take into account the liability of the lessee upon the covenants in the original lease: *Conquest v. Booth*, [1896] A. C. 490.

A prosecuting attorney is a judicial officer, and therefore not liable in an action for libel for reading in court an indictment in which he has maliciously included as a co-defendant one against whom no evidence was produced before the grand jury, and against whom no bill was in fact found: *Griffith v. Slinkard*, (Supreme Court of Indiana,) 44 N. E. Rep. 1001.

In the case last cited, it was further held, that, since the rule which protects judicial officers from liability for malicious acts done in the discharge of their judicial functions extends also to quasi-judicial officers, the members of a grand jury which has negligently or maliciously returned an indictment against a person without evidence of probable cause are not liable to that person in an action for malicious prosecution; and a prosecuting attorney is not liable in such an action, on the ground that he maliciously included in an indictment as a co-defendant a person against whom no evidence was produced before the grand jury and against whom no bill was in fact found: *Griffith v. Slinkard*, (Supreme Court of Indiana,) 44 N. E. Rep. 1001.

In an action for malicious prosecution it is no defence that the defendant submitted the case to the prosecuting attorney

Advice of
Prosecuting
Attorney

and acted on his advice, when it appears that all the facts bearing on the question of probable cause were not submitted to him: *Koster v. Sincy*, (Supreme Court of Iowa,) 68 N. W. Rep. 824; *Piterson v. Reisdorph*, (Supreme Court of Nebraska,) 68 N. W. Rep. 943.

Master and
Servant,
Contract of
Hiring,
Salary

In *Earle v. Warren Ax & Tool Co.*, (Supreme Judicial Court of Massachusetts,) 44 N. E. Rep. 1056, a contract of employment as a salesman for one year, subject to termination before its expiration, provided that the employe should receive a certain salary per month, based on an estimated total value of sales to be made by him, and subject to increase or diminution if the gross amount of his sales during the year exceeded or fell below the estimate. The employer terminated the contract at the end of eight months; but in view of the fact that efforts to sell usually in the early part of the year would not prove productive until late in the year, it was held that he was not entitled to make any deduction from the agreed salary because the sales made during the eight months did not amount to two-thirds of the total estimated for the year.

Eight-hour
Law,
Constitution-
ality

The Supreme Court of Utah lately held that the law of that state, (Laws Utah, 1896, p. 219,) imposing a fine upon any one who employs another to work in a mine more than eight hours a day, is not a contravention of the Federal Constitution, not being a deprivation of liberty without due process of law, nor denying to any one the equal protection of the laws: *Holden v. Hardy*, 46 Pac. Rep. 756.

Negligence,
Temporary
and Transi-
tory Danger

The Supreme Judicial Court of Massachusetts has recently decided, that a workman on a building, who fell and was injured as a result of stepping on a joist that had just been sawed nearly through by another workman, who had left it for a moment, could not recover from his employer for the injury, since "it would be impracticable to require employers to warn their men of every such transitory risk, when the only thing the men do not know is the precise time when the danger will exist: *McCann v. Kennedy*, 44 N. E. Rep. 1055.

It would have been equally reasonable to have held that this was a risk incident to the employment, which the workman assumed.

In his charge to the jury in the case of *U. S. v. O'Brien*, 75 Fed. Rep. 900, (Circuit Court, S. D. N. Y.,) Brown, Dist. ^{Neutrality} J., laid down some very important principles with ^{Laws} regard to the construction and effect of the neutrality laws of the United States. (Rev. Stat. U. S. §§ 5282, 5286.) He charged, (1) that while these laws prohibit any one from enlisting here as a soldier of any foreign power, and from hiring or retaining any other persons to enlist or to go abroad for the purpose of enlisting, they do not prohibit persons within the country, whether citizens or not, from going to a foreign country as individuals, and enlisting there; (2) That since it is lawful for individuals to go abroad to enlist, they may go in any number and in any way they see fit, either by regular lines of steamers, by chartering a vessel, or in any other manner, provided that they do not go as a military expedition, or set on foot within this country a military expedition or enterprise, to be carried on from this country, or provide or prepare the means therefor; (3) That it is no offence, under the neutrality laws, to transport persons intending to enlist in foreign military service out of this country, and land them in a foreign country, if they go merely as individuals, and not as a military expedition; but if the owner of a vessel provides and furnishes her, knowing that she is to be used to transport to a foreign country an organized body of men, who intend to act together in a concerted military service, and with arms, he is guilty of a violation of the law; (4) That is no offence against the neutrality laws to transport from this to a foreign country arms, ammunitions, and materials of war, either alone, or in the same ship with men who intend to enlist, provided they are not a part of or in aid of any military expedition or enterprise organized in this country; and mystery and secrecy in the preparation and conduct of the voyage are not conclusive of the illegality of the enterprise, but are as consistent with legality as with illegality, since

these precautions may be intended only to avoid attack and capture by the foreign power against which the arms and ammunition are to be used ; but (5) That if a military expedition or enterprise has in fact been prepared in this country, and carried by sea to a foreign shore, then all persons who planned for it or prepared for it here, or knowingly took part in the transportation of it, by furnishing the means therefor, or by conducting the vessel in which it was carried, are guilty under the laws ; and (6) That it is not necessary, to constitute a military expedition, that the men should be drilled or organized according to military tactics, as infantry, cavalry, or artillery : concert of action, combination and organization among the men to act together ; the presence of arms or weapons, which can be used for a military purpose ; and the direction or command of a superior, are all marks of such an expedition, to be considered by the jury.

One of several sureties upon a bond conditioned that the builder shall keep the building free from all liens, does not, by the fact of such suretyship, forfeit his right to enforce a lien as a material-man against the building : *Atlantic Coast Brewing Co. v. Donnelly*, (Supreme Court of New Jersey,) 35 Atl. Rep. 647.

A contract entered into by a public officer, (a county auditor) after the election of his successor, and but a short time before the expiration of his own term of office, for materials (election supplies) which will not be needed for use until eighteen months thereafter, is void, as against public policy : *Morrison v. Board of Comrs. of Decatur Co.*, (Appellate Court of Indiana,) 44 N. E. Rep. 1012, (on rehearing,) affirming 44 N. E. Rep. 65.

The Supreme Court of Pennsylvania has held in a recent case, that a prosecution against a public officer for being concerned in public contracts may be commenced by the court, of its own motion, by directing the grand jury to investigate the matter, and by directing the district attorney to submit an indictment, after a

Principal and
Surety.
Bond against
Liens.
Effect

Public
Officers,
Contracts,
Public Policy

Prosecution
in Office,
Indictment

presentment by them; and that an indorsement by the grand jury on an indictment as founded upon "presentment" is not erroneous because not founded on their own knowledge, but on testimony heard by them: *Comm. v. Hurd*, 35 Atl. Rep. 682.

Under the revised statutes of Ohio, § 11, which provide that "when an elective office becomes vacant, and is filled by
 Vacancy, appointment, such appointee shall hold the office
 Election till his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy," the Supreme Court has decided that when a candidate elected to an office dies before his term begins, no vacancy is thereby created in the office until the expiration of the term of the existing incumbent; and if this falls within thirty days of the next proper election, the vacancy cannot be filled by an election thereat: *State v. Dahl*, 45 N. E. Rep. 56.

The Supreme Court of Pennsylvania has succeeded in so far breaking away from the irrational "stop, look and listen" rule, as to hold that though the fact that safety
 Railroad rule, as to hold that though the fact that safety
 Crossings, gates at a railroad crossing, which should be
 Safety Gates, closed in case of danger, are standing open, does
 Negligence not relieve a traveller of the duty of exercising care, it is to be considered in determining whether he exercised due care according to the circumstances: *Roberts v. Del. & H. Canal Co.*, 35 Atl. Rep. 723.

This is a very important innovation upon the earlier case of *Greenwood v. P., W. & B. R. R. Co.*, 124 Pa. 572, 1889, where Chief Justice Paxson deliberately ignored the fact that the opening of the gates constitutes an invitation to cross. In that case, he stated that "I do not understand the law to be that when a railroad company adopts safety-gates or any other appliance for the safety of the public, that the public are thereby absolved from the duty of taking care of themselves," which was not at all the question involved, but a shrewd evasion of it. The real question was, whether or not the opening of the gates was an invitation to cross, giving

the traveler the right to expect that he would be allowed to cross in safety; *i. e.*, whether or not the standard of care required of him, (for not even an absolute assurance of safety relieves the traveler from the duty of exercising care according to the circumstances,) was not affected by that circumstance. That was the very point ruled in the present case; so that it may be regarded as practically overruling the Greenwood case.

The general doctrine on this subject is, that the opening of the gates at a crossing, and keeping them open, is an invitation to the traveler to cross, which entitles him, if in a vehicle, to rely on the assurance of the company that he may cross in safety, and absolves him from the duty of exercising the amount of care required at a crossing without gates: *Stapley v. London, Brighton & South Coast Ry. Co.*, 1 L. R. Exch. 21, 1865; *N. E. Ry. Co. v. Wanless*, 7 L. R. H. L. 12, 1874; *Whelan v. N. Y., L. E. & W. Ry. Co.*, 38 Fed. Rep. 15, 1889; *Baltimore & P. R. R. Co. v. Carrington*, 3 D. C. App. 101, 1895; *C., St. L. & P. R. R. Co. v. Hutchinson*, 120 Ill. 587, 1887; *Penna. Co. v. Stegemier*, 118 Ind. 305, 1888; *Indianapolis Union Ry. Co. v. Neubacher*, (Ind.) 43 N. E. Rep. 576, 1896; *State v. Boston & M. R. R. Co.*, 80 Me. 430, 1888; *Evans v. Lake Shore & M. S. R. R. Co.*, 88 Mich. 442, 1891; *D., L. & W. R. R. Co. v. Shelton*, 55 N. J. L. 342, 1893; *Glushing v. Sharp*, 96 N. Y. 676, 1884; *Palmer v. N. Y. Cent. & H. R. R. R. Co.*, 112 N. Y. 234, 1889; *C., C. & I. Ry. Co. v. Schneider*, 45 Ohio St. 678, 1888; *Wilson v. N. Y., V. H. & H. R. R. Co.*, 18 K. I. 491, 1894; and *a fortiori*, the raising of gates which have been lowered is an invitation to cross: *Conaty v. N. Y., N. H. & H. R. R. Co.*, 164 Mass. 572, 1895; *Bond v. N. Y. Cent. & H. R. R. R. Co.*, 69 Hun, (N. Y.) 476, 1893; *McGee v. Penna. R. R. Co.*, 33 W. N. C. (Pa.) 15, 1893; but a foot passenger who has an unobstructed view of the track, cannot rely absolutely upon this invitation: *Romco v. Boston & M. R. R. Co.*, 87 Me. 540, 1895; and one who is aware of the fact that the gates are not operated during certain hours cannot rely on an open gate as an assurance of safety, if he crosses the railroad during those hours: *Weed v.*

N. Y. Cent. & H. R. R. Co., 91 Hun, (N. Y.) 293, 1895. Of course, when the gates are down that fact constitutes a warning of danger to foot passengers, and it does not matter that the gates are always down at that spot: *Chicago, R. I. & P. Ry. Co. v. Fitzsimmons*, 40 Ill. App. 360, 1891; *Marden v. Boston & A. R. R. Co.*, 159 Mass. 393, 1893; *Clary v. P. & R. R. Co.*, 140 Pa. 19, 1891; *Matthews v. P. & R. R. Co.*, 161 Pa. 28, 1894; *Sheehan v. P. & R. R. Co.*, 166 Pa. 354, 1895; and the lowering of the gates is also a warning, imposing an extraordinary duty of exercising care upon a traveler: *Duwall v. Mich. Cent. R. R. Co.*, (Mich.) 63 N. W. Rep. 437, 1895.

A deposit of railroad bonds under a reorganization agreement, by which new bonds are to be issued, secured by a new mortgage on the property of the company, does not extinguish the bonds, so that the bonds of non-assenting holders remain as the only lien secured by the existing mortgages: *Mowry v. Farmers' Loan & Trust Co.*, (Circuit Court of Appeals, Seventh Circuit,) 76 Fed. Rep. 38.

It is the duty of a deputy sheriff, when specific information is conveyed to him that a felon is at a particular place within his jurisdiction, to take measures for his prompt apprehension; and he cannot claim that an arrest thus effected was made in his private capacity, so as to entitle him to a reward offered by private parties for the arrest: *Witty v. Southern Pac. Co.*, (Circuit Court, S. D. California,) 76 Fed. Rep. 217.

A public officer is not entitled to a reward offered for services which lie in the line of his duty; any agreement to compensate him for doing that duty is void, as against public policy; and his performance of the services, though according to the terms of the agreement, creates no contract between him and the person who offers the reward. This rule has been applied to constables, policemen, sheriffs, deputy sheriffs, watchmen, customs officers, and overseers of the poor: *R. R.*

v. *Grafton*, 51 Ark. 504, 1889; *In re Russell*, 51 Conn. 577, 1884; *Hayden v. Souger*, 56 Ind. 42, 1877; *Means v. Hendricks*, 24 Iowa, 78, 1867; *Marking v. Needy*, 8 Bush, (Ky.) 22, 1871; *Riley v. Grace*, (Ky.) 33 S. W. Rep. 207, 1895; *Pool v. Boston*, 5 Cush. (Mass.) 219, 1849; *Davis v. Burns*, 5 Allen. (Mass.) 352, 1862; *Warner v. Grace*, 14 Minn. 487, 1864; *Day v. Ins. Co.*, 16 Minn. 408, 1871; *Ex parte Gore*, 57 Miss. 251, 1879; *Kick v. Merry*, 23 Mo. 72, 1856; *Thornton v. Mo. Pac. Ry. Co.*, 42 Mo. App. 58, 1890; *Gillmore v. Lewis*, 12 Ohio, 281, 1843; *Rea v. Smith*, 2 Handy, (Ohio) 193, 1856; *Smith v. Whilldin*, 10 Pa. 39, 1848; *Stamper v. Temple*, 6 Humph. (Tenn.) 113, 1845; *Ring v. Devlin*, 68 Wis. 384, 1887. Even a private person, who is specially deputized to arrest a fugitive from justice, on his own application, is thereby brought within the reason of the rule: *Malpass v. Caldwell*, 70 N. C. 130, 1874; unless the warrant was illegal, or gave him no authority to make the arrest, in which case he can claim the reward: *Hayden v. Souger*, 56 Ind. 42, 1877.

If, however, the services are without the sphere of his official duty, so that in performing them he acts as a private citizen, a public officer can then claim the reward offered therefor: *England v. Davidson*, 11 Ad. & El. 856, 1840. Thus, an arrest without warrant for an offence not committed in the officer's view: *Kasling v. Morris*, 71 Tex. 584, 1888; *Russell v. Stewart*, 44 Vt. 170, 1872; an arrest in one state of a fugitive from another, made by an officer of either state, without process: *Morrell v. Quarles*, 35 Ala. 544, 1860; *Grace v. Pierce*, 53 Barb. (N. Y.) 387, 1860; *Davis v. Munson*, 43 Vt. 676, 1870; except when the laws of his state require him to make the arrest: *Monroe Co. v. Bell*, (Miss.) 18 So. Rep. 121, 1895; and an arrest by an officer temporarily suspended: *Smith v. Moore*, 1 C. B. 438, 1845, will all entitle the officer to the reward. So, a municipal officer who prosecutes an offender in another county: *Bronnenberg v. Coburn*, 110 Ind. 169, 1886; and a fireman who rescues a body from a burning building: *Reif v. Paige*, 55 Wis. 496, 1882, may recover a reward offered for such services, since they are not within the scope of their official duty.

The Appellate Court of Indiana has recently held that the duty of the porter of a sleeping-car to take charge of a passenger's baggage, and to assist in removing it from the car at its destination, being, under the rules of the particular company, within the scope of his employment, he is not to be regarded as a mere gratuitous bailee; and, therefore, when the porter of a sleeping-car, in pursuance of his customary duties, took charge of a passenger's baggage, for the purpose of removing it from the car at the passenger's destination, and it was lost or stolen through the negligence of the company's employes, the company was liable therefor: *Voss v. Wagner Palace Car Co.*, 44 N. E. Rep. 1010, (on rehearing,) affirming 43 N. E. Rep. 20.

The Appellate Court of Indiana has lately ruled, that when land was conveyed to one surety by absolute deed upon a parol agreement for the security and protection of himself and his co-sureties, and the latter paid the debt of the principal, and the grantee sold the land and refused to account, a bill by the co-sureties to compel the grantee to account for their share of the indemnity was not demurrable on the ground that it sought to establish a parol trust in lands, which is void by Rev. Stat. Ind. 1894, § 3391: *Kelso v. Kelso*, 44 N. E. Rep. 1013.

This decision might have equally well been rested upon the broad principles of contribution, with which the statute was certainly never intended to interfere.

Ardemus Stewart.

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GAMBLING CONTRACTS.—SALES ON MARGIN. The cases in which the question has been raised of the legality of sales of stocks or commodities are capable of classification into two general groups: (1) Where the parties contemplate delivery of the goods, whether actual or symbolical, unconditional or with a condition as to time; (2) where the parties contemplate no delivery, but reserve the option to demand delivery, or where they contemplate no delivery but only a settlement of the difference in price. The cases falling within the first group seem to determine that such sales are not wagers, but *bona fide* contracts: *Sawyer v. Taggart* (Ky.), 14 Bush, 727 (1879); *White v. Barber*, 123 U. S. 392 (1887); although at one time the Supreme Court of Pennsylvania seemed inclined to take a contrary view regarding contracts for the sale of stock for future delivery where the vendor has not the shares in his possession: *Ruchisky v. De Haven*, 97 Pa. 202 (1881).

Turning to the second class of cases we find that even where no delivery is contemplated, but one party reserves an option to require delivery if he choose, the contract is not necessarily invalid. That there is a hazard in such contracts is not denied, but it is well settled that there is nothing inherently or *prima facie* vicious about them: *Bigelow v. Benedict*, 70 N. Y. 202 (1877). It should be

noticed, however, that recent statutory provisions in some jurisdictions render certain contracts of this kind illegal: Ill. Cr. Code, §130. But where the intention of the parties is for a mere settlement of differences with no delivery of the things sold, the sale amounts to nothing more than a wager and neither party can enforce it: *Grizewood v. Blane*, 11 C. B. 526 (1851); *Benjamin on Sales*, 6 Ed. 490. This intention, however, must exist in the minds of both parties: *Warren v. Scanlan*, 59 Ill. App. 138 (1895); its existence is a question to be decided by the jury in each case: *Pope v. Hanke*, 155 Ill. 617 (1894); *Cover v. Smith*, 82 Md. 586 (1896); Biddle on Stock Brokers, 318; and in determining its existence all the attending circumstances of the may be taken into consideration, such as the brokers' mode of doing business, the size of the transaction in relation to the financial resources of the parties and the amount of margin put up: *Gave v. Bennett*, 153 Pa. 247 (1893); *Morris v. Norton*, (U. S. C. C. A. 6th C.), 75 Fed. Rep. 912 (1896).

How far the court will go in order to arrive at the real intention of the parties may be seen by referring to a recent case in the House of Lords: *Universal Stock Exchange v. Strachan*, L. R. [1896] App. Cas. 166. The appellant brought from and sold to the respondent various stocks and shares at the "take prices" of the day. The bought and sold notes made out in each transaction, stated that they acted "principal and broker" and subject to "the terms" printed on the back. The "terms of business" were signed by respondent, and contain, *inter alia*, the statement that "every purchase or sale contracted by the company is a *bona fide* transaction for delivery on a specified settling day, and the company is always prepared . . . to deliver or take up any stock it may at any time have bought or sold, and the contracts entered into . . . are not contracts of gaming or wagering." Then followed a provision for the postponement of the settling day, if mutually agreed upon, and for the payment of interest to the company on the amount of purchase moneys. In a suit by respondent to recover securities handed to appellant the court decided that, in spite of the plain statement in the written instrument that a delivery was intended, the jury was justified in finding, from the whole nature of the agreement, and from attendant circumstances, that no delivery was really contemplated. Lord Herschell, in the course of his opinion, said (page 173): "It has been said that wherever a contract is entered into between two parties containing an obligation under any circumstances to cause property to pass from one to another, whatever else there may be in the contract, and although neither party contemplate that that provision should ever become operative yet if it ever may become operative, the contract cannot be by way of gaming and wagering. The proposition amounts to this: that parties who intended to gamble with one another, but wanted to have the security against one another of being able in a court of justice to recover their bets, could compel a court of justice

to adjudicate and secure to them their bets by a judgment, if only they inserted in their contract a provision, which might in certain events become operative, to compel the goods to be delivered and received, although neither of them anticipated such a contingency, the purpose of inserting the provision creating an obligation being only to cloak the fact that it was a gambling transaction, and enable them to sue one another for gambling debts. . . . I should require much consideration before I gave my assent to a proposition involving such consequences." The following United States cases should be compared with the above: *Porter v. Viets* (U. S. C. C., N. D. Ill.), 1 Biss. 177 (1857); *ex parte Young*, 6 Biss. 53. In the English decisions we do not have an instance of the contradiction of a written contract by parol evidence, but rather a case of the interpretation of the terms of a transaction by reference to the general intent of a written instrument forming a part thereof, and to the attending circumstances, where the result is to contradict certain clauses of the instrument.

VERBAL ADMISION.—DECLARATIONS AS TO PEDIGREE. In *Flora v. Anderson*, 75 Fed. Rep. 217 (1896), the complainant sued to recover a portion of the estate of one Nicholas Longworth. He claimed as the illegitimate son of Eliza Longworth Flagg, daughter of Nicholas Longworth, who had devised to Larz Anderson, his son-in-law, and to Joseph Longworth, his son, the estate here in dispute, in trust for the benefit of his daughter, Eliza Longworth Flagg, during her life, with remainder to "the issue of her body surviving her, and in default of such issue over to his son, Joseph Longworth, and his grandson, John L. Stettinius." Eliza L. Flagg died in December, 1891, without issue of her marriage.

In order to maintain his claim it was necessary first for John W. Flora, the complainant, to prove himself the illegitimate child of Eliza L. Flagg. The testimony was voluminous, that of the complainant being founded almost altogether upon rumor and hearsay. The story advanced was that some time between 1822 and 1826 the complainant was born of Eliza Longworth, and when a few days old was delivered by agents of Nicholas Longworth to James Flora and his wife, of Kentucky, to raise; that Davis Carneal, husband of an aunt of Eliza Longworth, was father of the child, and that various visits were made by the Longworth family to Flora in Kentucky, when money and clothes were furnished to him.

Almost all this evidence was upon hearsay, from persons not believing to or related to the Longworth family, the witnesses giving statements which they said were made to them or in their hearing at times from thirty to fifty years before this bill was brought.

The defendants did not admit the competency of the evidence in respect to the taking of the child to Kentucky, the placing of him in the care of James W. Flora and wife, and showed discrepancies between various alleged statements brought forward by the

complainant; they further showed the absolute untruth of many of these assertions.

The complainant depended greatly upon a verbal admission of Carneal as to the pedigree of Flora and his transportation to Kentucky. The rule of evidence relative to verbal admissions was held to be peculiarly applicable in this case. Sage, District Judge, referred in this connection to § 200 of Greenleaf on Evidence, that all verbal admissions ought to be received with great caution. "The evidence, consisting as it does in the mere repetitions of oral statements, is subject to much imperfection and mistake, the party himself either being misinformed or not having clearly expressed his own meaning, or the witness having misunderstood him." Here the only parties who claimed to have heard Carneal, the incriminated uncle, make any statement concerning the taking of the complainant, when but a few days old, to Kentucky, undertook to detail statements made in his hearing when he was a boy of fourteen, more than seventy years before he gave his deposition.

With the exception of the alleged admission above referred to, the evidence of the complainant as to his relationship to Eliza Longworth Flagg was hearsay, being declarations made by *servants, friends, and neighbors* of the Longworth family. It was argued with force, and with not a little plausibility, that declarations of those so closely associated with a family as to be in fact almost a part of it should be admissible. In considering the law, the court laid down in a lengthy and learned opinion the following propositions as so well established that they form part of the settled law:

1. The law resorts to hearsay evidence in cases of pedigree upon the ground of the interest of the declarants in the persons from whom the descent is made out, and their consequent interest in knowing the connections of the family. The rule of admission is, therefore, restricted to declarations of the deceased persons who were related by blood or marriage to the person, and in that way interested in the succession in question: Greenleaf on Evidence, § 103; Taylor on Evidence, § 579; *Blackburn v. Craufords*, 3 Wall. 175; *Fulkerson v. Holmes*, 117 N. S. 389; *Sittler v. Gehr*, 105 Pa. 577.

This well-considered opinion adds authority to the rule permitting a resort to hearsay evidence of pedigree only in cases of declarations made by persons related by blood or marriage to the person from whom succession is to be traced.

2. The rule that hearsay evidence is admissible in cases of pedigree is limited to cases of legitimate relationship. In such cases the presumption is that declarations by deceased members of the family are true, because ordinarily there is no motive for false statements, as there is likely to be in cases of illegitimacy: *Crispin v. Dogliotti*, 3 Swab. & Tr. 44. Where a relationship is acknowledged as a matter of fact, and its lawfulness only is disputed, hearsay from members of the family may be introduced to show that such relationship was lawful or was not lawful. But hearsay cannot be in-

roduced to establish an unlawful relationship *per se*, where a lawful relationship is not claimed. There are cases in which testimony as to declarations of members of the family has been admitted to show that the claimant was a bastard. But on examination it will appear that in those cases the testimony was introduced, not to show bastardy *per se*, as a ground of claim, but to dispute a claim of legitimacy: *Vowles v. Young*, 13 Ves. 147; *Goodright v. Moss*, Corp. 593; *Murray v. Milne*, 12 Ch. Div. 845; *Jewel v. Jewel*, 1 How. 219; *Haddock v. Railroad*, 3 Allen 298. In *Doe v. Barton*, 2 Moody & R. 28, the declarations of illegitimate relations were rejected.

TWICE IN JEOPARDY—INSUFFICIENT INDICTMENT. Is an acquittal on an insufficient indictment a bar to a subsequent prosecution for the same offence?

The above question came up in the recent case of *U. S. v. Ball*, 163 U. S. 662 (1896). M. F. Ball and his brother, J. C. Ball, and Boutwell were tried for murder on an indictment not stating the place of death. M. F. Ball was acquitted, and the others were found guilty. They appealed on the ground of the insufficiency of the indictment, and the indictment was quashed. A new indictment was then prepared against all three. M. F. Ball pleaded *autrefois acquit*: the plea was overruled; he was found guilty and appealed. It was held by the Supreme Court of the United States, in an opinion by Mr. Justice Gray, that his acquittal was a bar to a subsequent prosecution for the same offence, being on the merits of the case, and not because of the insufficiency of the indictment, as is shown by the fact that his co-defendants were found guilty on that indictment.

It may be contended that this decision is contrary to the rule as laid down in *Vaux's Case*, 4 Rep. 44 (1591), and the cases following it in England and America, but an examination of these cases seems to point to a clear distinction between them and the case under discussion.

In *Vaux's Case* (*supra*) the defendant was charged with murder by poison and the indictment stated that the murdered man "took and drank," omitting "said poison." On a special verdict, the judgment was *quod eat sine die*. He was tried again, and the plea, *autrefois acquit*, was not allowed. Lord Hale (2 Pleas of the Crown, 394), thinks the judgment was delivered on the defect in the indictment as much as on the verdict, and says that had the judgment been on the verdict, *quod eat inde quietus*, the defendant could not have been tried again.

This case has been supposed by some authorities to lead to the doctrine that if the indictment is so ill that a judgment on it would be reversible for error, it is too defective to be considered as putting the defendant in jeopardy: *Bishop's Crim. Law*, s. 1021; 3 *Greenl. Ev.* s. 35. In *Commonwealth v. Purchase*, 2 Pick. 525 (1824) Parker, C. J., says of this theory: "This is because

it is presumed the court will discover the defect in time to prevent judgment. This protection is bottomed on the assumed infallibility of courts, which is not admitted in any other case."

According to the accepted rule, no man is considered twice in jeopardy until he is put on trial by a court of competent jurisdiction upon a sufficient indictment after an acquittal or conviction by a jury. Therefore, where he is discharged on the first indictment before verdict, he may be tried again. Also, where he has been discharged upon his own motion, by verdict, or in arrest of judgment, or in error, on the special ground of the insufficiency of the indictment and not on the merits of the case, he may be tried anew, for, then, the indictment and trial on it are held invalid at the special instance of the defendant, and the order for a new trial places him in the position as though no trial had been had. This principle covers the decision in *Vaux's Case* (*supra*) and the cases under it.

Also, where the defendant is acquitted or discharged on the ground of insufficiency of indictment, not on his own motion, but on that of the prosecution or by the court, it has been held he may be indicted again: *State v. Williams*, 5 Md. 82 (1855).

These cases show that where the acquittal is directly caused by the insufficiency of the indictment, it is no bar to a subsequent prosecution: they do not apply to cases where the acquittal is on other grounds.

In *People v. Barrett*, 1 Johns. 66 (1806), the defendant was tried for conspiracy in defrauding Darren of his goods. The indictment did not state the place of defrauding. During the trial a juror was withdrawn. A verdict of guilty was found, and judgment arrested by the court. The defendant was tried again, pleaded *autrefois acquit*, and the plea was overruled by a divided court on the ground that the indictment was erroneous. The majority of the court held that the case fell under the rule of *Vaux's Case* (*supra*), failing to note that the acquittal in the case under their consideration was not because of the insufficiency of the indictment, as that was not discovered till after verdict. This distinction between *People v. Barrett* and *Vaux's Case* is pointed out by Livingston, J., in his dissenting opinion, which it is submitted is the correct one in that case. He shows the danger involved in the rule as declared by the majority of the court, as it would give the district attorney power to try *ad infinitum* an acquitted man as often as some latent defect can be discovered in the indictment. But even in this case there was no acquittal on the merits. The defendant was found guilty on the merits, and was afterwards discharged in arrest of judgment because a juror had been withdrawn, and this fact may have influenced the court on the second trial to extend the rule of *Vaux's Case* beyond what Lord Hale considered its true meaning.

Therefore, no previous case had decided the point in question in *U. S. v. Ball*; whether an acquittal on the merits, the indictment being insufficient, was a bar to a subsequent prosecution.

In allowing the plea of former acquittal in this case, Judge Gray refers with approval to the dissenting opinion of Judge Livingston in *People v. Barrett* (*supra*), and says the principle of the common law is correctly stated in the Revised Statutes of Massachusetts (1836): Public Stat. Mass. 1133. This provides that where a man has been acquitted by a jury on the facts and merits, such acquittal may be pleaded in bar of a subsequent prosecution for the same offence, notwithstanding any defect in the indictment on which he was acquitted; where he is acquitted on any exception to the form or substance of the indictment he may be tried on a new indictment, notwithstanding the former acquittal. A similar provision exists in Alabama.

Under the last clause of the Massachusetts statute fall *Tana's Case* (*supra*), and the multitude supporting it, and under the first *Rall v. U. S.* (*supra*), and in no better way can the distinction be made clear than by reference to that statute.

LOCAL SELF-GOVERNMENT. The case of *Rathbone v. Wirth*, 45 N. E. R. 15, (Oct. 27, 1896), is one of the latest attempts of the courts to determine what is included within the limits of that indefinite term "local self-government." The scope of the power resident in each community to manage its own affairs is necessarily, from its nature, somewhat variable, but it would seem that it might be approximately arrived at. A great service will have been performed when it is authoritatively settled. In the meanwhile cases like *Rathbone v. Wirth* are bound to arise whenever a state legislature endeavors to regulate the affairs of any particular locality.

The action in *Rathbone v. Wirth* was brought to obtain an injunction restraining the common council of Albany from electing police commissioners in pursuance of the provisions of chapter 427 of the laws of 1896, passed to amend chapter 77 of the laws of 1870 and other acts relating to the police department of that city.

The amending act provided, *inter alia*, that the police board should "consist of four police commissioners, not more than two of whom shall belong to the same political party," that "each member of the common council shall be entitled to vote for not more than two of such persons, and the four persons receiving the highest number of votes shall be such police commissioners," that a vacancy "shall be filled by appointment by the mayor upon the written recommendation of a majority of the members of the common council belonging to the same political party or organization as the police commissioner whose office shall become vacant," and that "no person is eligible to the office of police commissioner unless, at the time of his election, he is a member of the political party or organization having the highest or the next highest representation in the common council."

The Supreme Court at special term and in the appellate division upheld the plaintiffs in their demand for an injunction, and the

defendants appealed. The judgment was affirmed, but three judges dissented.

The view of the majority, holding the act unconstitutional, was based on the ground that it offended against section 2, article 10, of the State Constitution, which provides that "all city, town and village officers whose election or appointment is not provided for by this constitution, shall . . . be appointed by such authorities thereof, as the legislature shall designate for that purpose." The court considered that when the legislature had once acted upon this constitutional provision and had determined upon the local appointing power, that power ought not to be hampered or impeded. This was thought by Gray, J., to be the chief objection to the act. It threatened in his judgment the cardinal principle of local self-government. He says: "In the local or political subdivisions of the state the people of the locality shall administer their own local affairs to the extent that that right is not restricted by some constitutional provision." The right to administer evidently includes the right to choose the local officers, either directly by election or indirectly through appointment by the local authorities.

Other grounds for holding the act unconstitutional were that it destroyed majority rule; that it deprived citizens of rights otherwise than by the law of the land or the judgment of their peers; that it provided an additional test of qualification for an office of public trust; and that even if the obnoxious clauses were struck out, the purpose for which the act was passed, namely, to obtain a non-partisan board, would be defeated.

The dissenting judges agreed with the majority of the court in considering that the clauses which limited eligibility for office to members of the two leading political parties were unconstitutional, but thought that they could be eliminated without affecting the act; there would remain, however, the provision that not more than two commissioners should belong to the same party, which would not necessitate the appointment of holders of any particular political belief, and which was similar to provisions that have been held constitutional. They also held that the legislature could prescribe the details of procedure provided it did not deprive the appointing authority of the power to act in the premises, and they denied that such was the effect of the act.

Looking at the act with regard to its advisability, it would seem that, while the object was an excellent one in some ways, the method employed was a distinct encroachment upon the rights of the locality, and the result would probably have been a deadlock in the board, it being divided as to every question upon political lines. The experience of municipal governments seems to show that more is accomplished by an active and responsible man than by a board where political considerations have weight. The street cleaning of New York furnishes an example. For these reasons, therefore, the decision appears to be a wise one.

BOOK REVIEWS.

THE AMERICAN DIGEST. (Annual. 1896.) Prepared and Edited by the Editorial Staff of the National Reporter System. St. Paul, Minn. : West Publishing Co. 1896.

The profession is under great obligations to the editors and publishers of this Annual. The new Digest is constructed on the same admirable lines as its predecessors. About one-sixth larger than the '95 Annual, it begins to assume Brobdignagian proportions.

FEDERAL JURISDICTION AND PROCEDURE as modified by Acts of Congress of March 3, 1891, and March 3, 1887. Corrected by the Act of August 13, 1888. WILLIAM A. MAURY, I.L.D. Washington, D. C. : W. H. Lowdermilk & Co. 1896.

As indicated by the title, this pamphlet treats of the jurisdiction of the Federal courts as affected by recent legislation. It was prepared for use in the Law School of Columbian University with the object of collecting in a convenient form the above-mentioned acts, together with such portions of the constitution and revised statutes as are necessary to a full understanding of the purpose with which Congress acted, and the scope within which its powers were exercised.

As the work does not aim at a general discussion of Federal jurisdiction but simply at a reproduction of the results which have been reached, the author's province has been limited to the field of compilation, but the orderly and logical arrangement make the book useful for purposes of reference.

M. L., Jr.

COMMENTARIES ON AMERICAN LAW. By JAMES KENT. Fourteenth Edition. Edited by JOHN M. GOULD, Ph.D. Boston : Little, Brown & Co. 1896.

Though seventy years have passed since the first of these great Commentaries appeared, they still rank as the first of American classics. In that period there have been many changes in our growing jurisprudence, but there is, notwithstanding, extraordinary harmony between Chancellor Kent's views and the decisions of the highest courts at the present time. It goes without saying, however, that the works have needed an annotator. Twenty-three years ago Judge Holmes, in his celebrated Twelfth Edition, for the time being, supplied this need. His notes were able and elaborate. Ten years later Mr. Barnes edited a Thirteenth Edition, not covering quite so thoroughly the intervening developments in the law. Since these editions there has been a sufficient growth in the law to justify as careful a piece of work as that of Dr. Gould. Inter-

national law, in particular, has of late acquired a new importance, and on this subject Dr. Gould furnishes some valuable notes. Other parts of the work which have received particular attention are those relating to equity, judgments, taxation, master and servant, aliens, the domestic relations, patents, copyrights and trademarks. Judge Holmes's notes are preserved in full, and together with those of Mr. Barnes, preserved in large part, are readily distinguishable by their arrangement from the notes by Dr. Gould. To the twenty-three thousand cases cited in the previous edition, the present editor has added nine thousand, many of which he makes the basis of useful comment. Foreign judgments receive careful attention in an excellent note. Dr. Gould's work is well done, and adds appreciably to the value of the commentaries.

W. C. D., Jr.

THE QUESTION OF COPYRIGHT. Compiled by GEORGE HAVEN PUTNAM, A. M., Secretary American Publishers' Copyright League. Second Edition. New York and London: G. P. Putnam's Sons. 1896.

In justice and morality it has never been a disputable question that the property right in the products of man's inventive or literary faculties is as absolute as in articles manufactured or developed by manual skill and labor. The law, following these footsteps, but, as usual, lagging somewhat behind, has to an extent recognized the right, but has not advanced as far with respect to copyright as it has in the case of patents.

By the provisions of the Berne convention, which went into effect in 1887, and which have been accepted by all the literature-producing and literature-consuming nations of the world, the United States alone excepted, it is now easy for authors in any country, with the above exception, by fulfilling the requirements of these domestic copyright laws, to secure without further condition or formalities copyright for their productions in all the states comprising the International Union. But as regards our own country, it is still true, as Mr. Putnam remarks, that "the patentee of an improved toothpick is able to secure to-day a wider recognition of his right than has been accorded to the author of 'Uncle Tom's Cabin' or of 'Adam Bede.'"

Mr. Putnam presents the reader with a vivid contrast between our copyright laws and those of other civilized countries, and he reminds us that, although the act of 1891 was a considerable advance, it yet leaves us far behind the rest of the world in the recognition of literary property. As is pointed out in the preface, the provision that America's *manufacture* of a book shall be a pre-requisite to its American copyright, represents a stage of policy which was reached in England, France, and Germany in the early years of the century, and the requirement of simultaneous publication constitutes an insuperable obstacle to the copyrighting of books

requiring translation. The book presents in addition, in convenient form, interestingly written, much valuable data on the whole subject of international copyright, embracing the full text of the United States law, the regulations for obtaining copyrights, and a list of the countries with which we have reciprocal agreements. There is also a summary of American legislation, by R. R. Bowker; an abstract and digest of the English law, by Sir James Stephen; an analysis of the Monkswell bill of 1890, by Sir Frederick Pollock; a history of the contest in the United States for international copyright, etc., etc. The editor contributes several valuable papers, and there are others by Prof. Bearde Matthews and R. R. Bowker on the "Evolution of Copyright," "Literary Property," and "Copyright and the Prices of Books."

Altogether the volume constitutes a useful and important utterance on a subject of ever-increasing interest, and whether regarded from the purely technical standpoint or from that of literature in the broad sense and contemporary history, deserves a place in every library.

W. S. Ellis.

THE NATURE OF THE STATE. A Study in Political Philosophy. By WESTEL WOODBURY WILLOUGHBY, Ph.D. Lecturer in Johns Hopkins University. New York: MacMillan & Co. 1896.

This work, like every other treatise on philosophy, abounds in the intricate and profound. While not a legal production, yet it is concerned with just such a mental problem as frequently confronts a lawyer, and a careful perusal of its pages cannot fail to instruct and improve. It is only necessary to read the opening chapter, which deals with the scope of the work, in order to appreciate the difficult nature of the task the author sets about to accomplish. The work he assigns himself is to justify the exercise of political power by the State, in what is the most important chapter of the book, viz: "The Origin of the State," and then to discuss in the following chapters, "The Nature of Law," "Analytical Jurisprudence," "Sovereignty," "The Composite State," "The Location of Sovereignty," "The Aims of the State," "The Classification of Governments," closing with a chapter containing a recapitulation and a brief comment on Present Political Characteristics and Tendencies.

The author starts out with a statement of the importance of a rigid adherence to the exact connotation of terms used, and for the most part he is precise in the use of them, but on page 176 falls into the error of confounding the expressions "*ex post facto* law" and retro-active law, treating the two as synonymous.

After a few definitions of terms the author defines, or rather enumerates, the requisites of a State as follows: (1) A community of people socially united; (2) a political machinery, termed a government, and administered by a corps of officials termed a magistracy; (3) a body of rules or maxims, written or unwritten,

determining the scope of this public authority and the manner of its exercise. Mr. Willoughby does not discuss Political Science from a historical standpoint, and thus review the characteristics of ancient, mediæval or modern States, but rather seeks to formulate into a theory, the essentials of an ideal State, which may be its own justification and a model for all political associations. At the threshold of the work he distinguishes between State and Government describing the latter as merely the machinery through which the purposes of the former are formulated and executed. And immediately after this distinction the statement is made and verified by quotations, that a failure by philosophers in the past, to distinguish between these two terms has led directly or indirectly to erroneous results and much confusion.

The meaning of the word State as used in this treatise is next distinguished from the terms Nation and People to which the Americans and English have given a meaning the converse of that given by the Germans; the word Nation with the Germans meaning a collection of individuals united by ethnic or other bonds, irrespective of political combination, while a People denotes a body of individuals organized under a single government, which meanings are preferred by the author.

The assertion is then made that as soon as social life begins, we find men submitting to public authority, and while the variations may be such that no two instances are entirely similar, yet we will recognize that no matter how organized, there is in all States a substantial identity of purpose, and the aim of the task undertaken is definitely to determine the requisites and limits of such public authority. States may differ, it is contended, in the qualities of their governmental machinery, but it is denied that they themselves admit of comparative degrees of excellence. In other words, there can be no such thing as an imperfect State.

After discussing briefly the theories—the Patriarchal and its opposite, that of Morgan and McClennan, holding that a common horde with absolute promiscuity in sexual relation preceded that of the rule of the head of the family—the author pertinently concludes: "Whether by original force or by voluntary recognition and establishment, whether founded upon acknowledged supremacy of personal prowess and sagacity of the leader selected, or whether springing from patriarchal authority the public authority becomes established cannot now be known and undoubtedly differed in different instances. But, however originated, a public authority once created, the State becomes an established fact."

Given the existence of the State, the various theories advanced by which such public control may be justified, viz.: The Natural or Instructive, The Utilitarian, The Divine, and the Contract, together with frequent quotations from Hobbs, Locke, and Rousseau, advocates of the latter, and after criticising and rejecting each, he reaches the following conclusion: That there is no necessity, as often contended is, of finding a moral justification for the

control of the State ; that those who hold to the Contract theory start with the assumption of complete freedom in every man to do as he likes, when in fact this is out of the question. With the social life of men, antagonism between their respective interests and spheres is an absolute necessity. Hence the restraint imposed by the State is the same as would otherwise be imposed by individuals, and far more moderately and judiciously exercised.

The basis of the State's control, then, is its utility : not, however, that utility which presumes a natural right of freedom in each man, and then overrides it for the good of all, but a utility which, while not recognizing any such natural freedom, is justified by its manifest potency as an agent for the progress of mankind, and under the control of which he is not less free than in its absence.

Now as to when the State is born. From the standpoint of Public Law, the author admits that its beginning is at the time a political authority is instituted, but contends that from a philosophical point of view we must go back of this period to the moment when the first feeling of unity began to be felt. The discussion of the Origin of the State closes with a very fine distinction between the General Will and the will of a majority of the individuals.

The chapter on Nature of Law briefly refers to four sources, viz. : Statutes, Law Evolved from Continued Customs, Written or Unwritten Constitutions, and International Law, followed by a comment upon the Growth of Law.

After a very interesting and satisfactory discussion of the subject of the Location of Sovereignty, he concludes that "All organs through which are expressed the volitions of the State, be they parliaments, courts, constitutional assemblies, or electorates, are to be considered as exercising sovereign power, and as constituting, in the aggregate, the depository in which the State's sovereignty is located.

The chapters on The Aims of the State and The Classification of Governments are able and interesting, reviewing and criticising with intelligence the doctrine of writers of note on each subject.

The book closes with a brief but a very clear and interesting forecast of modern political tendencies, devoting its attention chiefly to the United States as the type of the democratic era which Mr. Willoughby says has been for some time past inaugurated. As a whole, the treatise, which occupies less than five hundred pages, is clear in its statement of difficult problems, intelligent in its discussion of them, fair and able in its criticism, and logical in its reasoning and results. To all who love to delve into philosophical questions of this character the book is commended as a scholarly attainment.

Benjamin F. Perkins.

BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked * will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.]

TREATISES.

COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, HISTORICAL AND JURIDICAL. By ROGER FOSTER. Three Volumes. Vol. I. Boston: The Boston Book Co. 1895.

AMERICAN RAILROAD AND CORPORATION REPORTS. Edited by JOHN LEWIS. Vol. XII. Chicago: E. B. Myers & Co. 1896.

THE ELEMENTS OF JURISPRUDENCE. By THOMAS ERSKINE HOLLAND, D.C.L. Eighth Edition. Revised. New York: The MacMillan Co. 1896.

MORTUARY LAW. By SIDNEY PERLEY, of the Massachusetts Bar. Boston: Published by George B. Reed. 1896.

A TREATISE ON THE LAW OF CIRCUMSTANTIAL EVIDENCE. By ARTHUR P. WILL, of the Chicago Bar. Philadelphia: T. & J. W. Johnson & Co. 1896.

THE LAW OF EVIDENCE IN CIVIL CASES. By BURR W. JONES, of the Wisconsin Bar. Three Volumes. 18mo. San Francisco: Bancroft-Whitney Co. 1896.

AMERICAN AND ENGLISH DECISIONS IN EQUITY. Being select cases decided in the Appellate Courts of America and England with notes. Annotated by ARDMUS STEWART, of the Philadelphia Bar. Philadelphia: M. Murphy. 1896.

A TREATISE ON THE LAW OF FIRE INSURANCE. By D. OSTRANDER. Second Edition. St. Paul, Minn.: West Publishing Co. 1897.

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No. 2.

THE COMPULSORY DUPLICATION OF STOCK CERTIFICATES.

§ 1. INTRODUCTORY.

Whenever two certificates are issued by a corporation representing the same shares of stock, the legal situations which may arise are varied, complicated, and interesting. If the two certificates are in the hands of different owners, one of three parties must suffer. One or the other of the certificate-holders must lose the stock ; and the loser must either bear his loss, or throw it upon the corporation if he can. Before proceeding to the consideration of our particular subject, therefore, it will be well to consider briefly some of the general principles governing the issue of stock-certificates and the transfer of stock.

1. The registered owner of stock can be deprived of his title to such stock only by his own act,¹ or by some legal proceeding *quasi in rem*.²

2. There are two essential factors in the transfer of the legal title to stock. One is the transfer of the interest of the registered owner in accordance with the preceding rule ; t

¹ *Colonial Bank v. Cady*, 15 A. C. 267 (1890) ; *Telegraph Co. v. Daw* part, 97 U. S. 643 (1878).

² *Dewing v. Perdicaris*, 96 U. S. 193 (1877) ; *Chapman v. Phoenix N. Bank*, 85 N. Y. 437 (1861).

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other is the recognition of this transfer by the corporation. When both of these take place the legal title to the stock is transferred.¹ This principle seems to have been overlooked in *Tilford Turnpike Co. v. Gerhab*.² In that case A., the registered owner of stock transferred his certificate to B. The corporation had notice of the transfer, which, however, was not recorded. Subsequently the stock was attached by a creditor of A.'s and sold to C. at the execution sale, C. having notice of the prior transfer to B. The corporation recognized C. as the owner of the stock. In an action for damages brought by B. against the corporation, the court held that B. could not recover the value of the stock, but only for the damage he had sustained by reason of the defendant's refusal to recognize the transfer to him; on the ground that *no title* to the stock had passed to C. Now, while B. clearly had the superior equitable right to the stock, and could enforce his claims against both C. and the corporation, it seems that C. had acquired the legal title to the stock by virtue of the act of the corporation in recognizing the execution sale as transferring A.'s interest in the stock. Suppose that C. had sold his certificate to D., a purchaser without notice of B.'s claim, would not D.'s title to the stock have been superior to C.'s?

3. The transfer of the stock certificate by indorsement and delivery operates as a complete equitable assignment of the stock.³ Since the assignment is *complete*, equity will enforce it even in favor of a volunteer,⁴ whereas an incomplete assignment is unenforceable unless the assignee has given value.⁵ There is much confusion in the books in the use of the terms "legal title" and "equitable title" with reference to stock. It is often said, for example, that the legal title passes as between the parties by the indorsement and delivery of the certificate.

¹ *New York, N. H. & H. R. Co. v. Schnyler*, 34 N. Y. 30 (1865); *London v. Prov. Tel. Co.*, L. R. 9 Eq. 653 (1870).

² 13 Atl. 90 (1888).

³ *Black v. Zacharia*, 3 How. 482 (1845).

⁴ *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365 (1879).

⁵ This distinction is clearly pointed out in *Harding v. Harding*, 17 Q. B. D. 442 (1886).

Force is given to this statement by the fact that the assignee of the certificate is often allowed legal remedies to enforce his rights. Thus, it is often held that the assignee of the certificate may sue the corporation for conversion of the stock if it fails to recognize his right to the stock; and in some jurisdictions mandamus will lie against the corporation to compel a recognition of the transfer. The existence of legal remedies, however, while it gives rise to many anomalies, does not change the essential character of an equitable right. The legal title to stock is acquired only when the corporation recognizes the transfer.¹ Some of the American decisions, it is true, establish a different rule in regard to the priority of equitable interests in stock from that which is upheld in England,² but such decisions do not and cannot affect the essential requisites of transfer of the legal title.

4. The issue of a stock-certificate amounts to an affirmation on the part of the corporation that the person named therein is the legal owner of the stock. This affirmation works an estoppel against the corporation in favor of one who acts in reliance upon it.³ This affirmation will be enforced specifically if possible;⁴ but if specific performance is impossible, as where the certificate represents an over-issue, the party claiming the benefit of the estoppel is entitled to damages for the false representation.⁵ This principle is too well established to be questioned; yet in a single instance our courts have either overlooked it or refused to apply it. In *Dewing v. Perdicaries*,⁶ stock in a South Carolina corporation belonging to loyal owners was sequestered by judicial proceedings taken in the Confederate District Court in accordance with a statute of the Confederate States. The sequestered

¹ *Shropshire Union Canal Co. v. Queen*, L. R. 7 H. L. 496 (1875); *Winter v. Belmont Mining Co.*, 53 Cal. 428 (1879); *Société Générale de Paris v. Walker*, 11 A. C. 20 (1885); *New York, N. H. & H. R. Co. v. Schuyler*, 34 N. Y. 30 (1865).

² *Winter v. Montgomery Gas Light Co.*, 89 Ala. 544, 7 S. 773 (1890).

³ *Simm v. Anglo-Amer. Tel. Co.*, 5 Q. B. D. 188 (1879); *Mandlebaum v. North Amer. Min. Co.*, 4 Mich. 465 (1857).

⁴ *Barkinsaw v. Nicolls*, 3 A. C. 1004 (1878).

⁵ *New York, N. H. & H. R. Co. v. Schuyler*, *supra*; *In re Bahia & S. P. Ry. Co.*, L. R. 3 Q. B. 584 (1868).

⁶ 96 U. S. 193 (1877); *Central R. Co. v. Ward*, 37 Ga. 315 (1868).

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stock was sold, and the corporation was compelled by the Confederate authorities to issue stock certificates to the purchasers. The Supreme Court held that the order of sequestration, the sale, the transfer, and the new certificates were void, and did not affect the rights of the loyal owners of the stock. The court also held that the transferees of the new certificates, although *bona fide* purchasers for value, could acquire no right of indemnity against the corporation. The reason given for this holding is that the transferee of the certificate can acquire no greater rights than his transferor possessed. The court seems to overlook the fact that the right of a *bona fide* purchaser of a void certificate against the corporation is not a derivative right, acquired by assignment from his transferor, but an independent right, personal to himself, and resulting from his having acted in reliance on the representation of the corporation contained in the certificate. The decision in question seems to have been influenced rather by patriotic than by legal reasoning.

5. Inasmuch as the transfer of the certificate by indorsement and delivery operates as a complete equitable assignment of the stock, the corporation acts at its peril in recognizing a transfer and issuing a new certificate when the old is not surrendered. It is, therefore, liable in damages to one who purchases the original certificate for value and without notice,¹ unless it can show that the holder of the new certificate has a better title to the stock than the holder of the original certificate.²

6. Ordinarily, the corporation is not bound to issue a new

¹ Bridgeport Bank v. N. Y. & N. H. R. Co., 30 Conn. 231 (1861); Société Générale de Paris v. Walker, 11 A. C. 30 (1885), per Lord Selborne; Bank v. Lanier, 11 Wall. 369 (1870); New York, N. Y. & H. R. Co. v. Schuyler, 34 N. Y. 30 (1865); Strange v. H. & T. C. Ry. Co., 53 Tex. 162 (1880); Hazard v. National Exchange Bank, 26 F. 94 (1886); Sargent v. Essex Marine Co., 9 Pick. 201 (1829); Factors' and Traders' Ins. Co. v. Marine Dry Dock Co., 31 La. Ann. 149 (1879); De Comeau v. Guild Farm Oil Co., 3 Daly, 218 (1870); Smith v. American Coal Co., 7 Lana. 317 (1873); Cushman v. Thayer Mfg. Co., 76 N. Y. 365 (1879); Keller v. Bureka Brick Co., 43 Mo. App. 84 (1890); Balkis Consol. Co. v. Tomkinson (1893) A. C. 396.

² Sprague v. Cocheco Mfg. Co., 10 Blatchf. 172 (1872); Fisher v. Essex Bank, 5 Gray, 373 (1855); Princeton Bank v. Crosser, 22 N. J. L. 383 (1850); Naglee v. Pacific Wharf Co., 20 Cal. 529 (1862); Blanchard v. Durham Gas Light Co., 12 Gray, 213 (1858); Young v. So. Traders Iron Co., 1 Pickle, 189, 2 S. W. 202 (1886), *semble*.

certificate for stock unless the old is surrendered. In certain cases, however, the law requires the issue of a new certificate without the cancellation of the old. If the rule stated in the last paragraph be correct, the law should not compel the issue of a new certificate in such cases unless the rights of the holder of the new certificate are made paramount to those of the holder of the original. To require the corporation to issue a new certificate without requiring the surrender of the old, and without making the rights of the holder of the new certificate paramount, is to compel the corporation to incur a possible liability to the holder of the original certificate, a result which is manifestly unjust to the corporation. Yet there are two classes of cases in which the law thus ignores the rights of the corporation. It need hardly be said that such law is the result of legislative, not of judicial action. In the first class of cases the law requires the issue of a new certificate to one who claims the stock, not by virtue of a voluntary transfer by the owner, but as the result of a judicial seizure of the stock. In the second class of cases the new certificate must be issued to replace an original supposed to be lost or destroyed.

§ 2. COMPULSORY DUPLICATION OF CERTIFICATES IN CONSEQUENCE OF JUDICIAL SEIZURE OF STOCK.

The seizure of stock by legal process is purely a matter of statute. Two theories exist as to the nature of such seizure. According to the first theory, which prevails almost everywhere, stock is seized by a proceeding *quasi in rem* brought against the owner personally, and against the stock by giving notice in some form to the corporation at its domicile. According to the second theory, stock may be seized by seizing the certificates of stock in the hands of the holder.

1. SEIZURE OF STOCK AT THE DOMICILE OF THE CORPORATION.

The methods of seizure provided by statute in various jurisdictions are numerous. The following methods are more or less common: Attachment, execution, involuntary bankruptcy, garnishment of the corporation, seizure for taxes, confiscation. Charging orders on the stock, and statutory equitable proceedings *quasi in rem*. It is not the purpose of this article

to discuss these methods in detail, but simply to point out the effect upon the corporation of the duplication of certificates in consequence of such proceedings. For it is almost universally held that the person claiming title to the stock in consequence of such seizure is entitled to a new certificate of stock; and of course he is unable to surrender the old certificate, which is not in his possession or control. The determination of the liability of the corporation in these cases is a simple matter if we bear in mind the rule given in § 1, par. 5. The test of such liability to a purchaser of the original certificate for value and without notice is the relation between the rights of such purchaser and those of the holder of the new certificate. Disregarding, therefore, the manifold differences in statutes and statutory construction, our attention will be confined to the examination of the different rules which have been applied to determine the respective merits of the claims of the holders of the two certificates.

(a.) When the seizure of the stock by process directed against the interest of the registered owner takes place, no subsequent transfer of the original certificate by the owner can confer any right upon the transferee as against the corporation or the party claiming under the seizure.¹

(b.) In the following cases the rights of the transferee for value before the seizure have been held superior to those of the party claiming under the seizure.² This rule does not protect a

¹ *Sprague v. Cocheco Mfg. Co.*, 10 Blatchf. 172 (1872); *Wilson v. Atlantic, etc., Ry. Co.*, 2 F. 459 (1880); *Kentucky Nat. Bank v. Avery*, 12 Nat. Corp. Rep. 111, Ky. C. C. (1896); *Harris v. Bank*, 5 La. Ann. 538 (1850); *Morehead v. Western N. C. R. Co.*, 96 N. C. 362, 2 S. E. 247 (1897); *Young v. So. Tredegar Iron Co.*, 1 Pickle, 189, 2 S. W. 202 (1886); *Chesapeake & Ohio R. Co. v. Paine*, 29 Gratt. 502 (1877); *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913 (1882).

² *Continental Nat. Bank v. Elliot Natl. Bank*, 7 F. 369 (1881); *Scott v. Bank*, 21 Blatchf. 203, 15 F. 494 (1883); *Hazard v. National Exch. Bank*, 26 F. 94 (1886); *Manus v. Brookville Nat. Bank*, 73 Ind. 243 (1881); *Thurber v. Crump*, 86 Ky. 408 (1887), *semble*; *Kentucky Nat. Bank v. Avery*, (Ky. C. C.) 12 Nat. Corp. Report. 111 (1896); *Smith v. Crescent City Co.*, 30 La. Ann. 1378 (1878); *Friedlander v. Slaughterhouse Co.*, 31 La. Ann. 523 (1879); *Pilot v. Johnson*, 33 La. Ann. 1286 (1881); *Kern v. Day*, 45 La. Ann. 71, 12 S. 6 (1893); *Boston Music Hall Ass'n v. Cory*, 129 Mass. 435 (1880); *Andrews v. Worcester R. R. Co.*, 159 Mass. 64, 33 N. E. 1109 (1893); *Lund v. Wheaton Roller Mill Co.*, 30 Minn. 36, 52 N. W. 268 (1892); *Broadway Bank v. McKirath*, 13 N. J. Eq. 24 (1860); *De Corman v. Guild Farm Oil Co.*, 3 Daly, 218 (1870); *Smith v. American Coal Co.*, 7 Lana. 317 (1873); *Dunn v. Star Ins. Co.*, (N. Y. Supreme

transferee who has not given value;³ it simply recognizes the rights of purchasers as superior to those of creditors and other persons claiming under the seizure. The preference of purchasers over creditors seems in accordance with enlightened public policy, yet wherever this rule holds good the corporation runs the risk of incurring liability in consequence of a duplication of certificates; for if it has no notice of the prior assignment of the stock by the registered owner, it may be compelled to issue a new certificate to the party claiming under the seizure, thereby becoming liable in damages to the assignee of the original certificate.

(c.) In the following cases the rights of the party claiming under the seizure have been held superior to those of an assignee of the certificate claiming by a transfer before the seizure.⁴ This rule protects the corporation in issuing a new certificate, but bears harshly on the *bona fide* purchaser of the original certificate. The rule seems to rest on statutes giving creditors greater rights than purchasers for value. A purchaser for value of the legal title is bound in equity by notice of a prior equitable assignment, but under this rule a creditor is not.

(d.) In many cases the rights of the different claimants of the stock are made to depend upon the question of notice to the party claiming under the seizure. In the following cases the rights of the party claiming under the seizure without

Cl.), 19 N. Y. Weekly Digest, 531 (1884); *Weller v. J. R. Pace Tobacco Co.*, 2 N. Y. Supp. 292 (1888); *Morehead v. Western N. C. R. Co.*, 96 N. C. 362, 2 S. E. 247 (1887); *Norton v. Norton*, 43 Ohio St. 309, 3 N. E. 348 (1885); *Haldeman v. Hillsborough, etc., R. Co.*, 2 Handy, 101 (1885); *United States v. Vaughan*, 3 Binney, 391 (1811); *Commonwealth v. Watnough*, 6 Whart. 117 (1840), *semble*; *Finney's Appeal*, 59 Pa. St. 398 (1868); *Cornick v. Richards*, 3 Lea, 1 (1879), *semble*; *Seligson v. Bours*, 61 Tex. 114 (1884); *Chesapeake & O. R. Co. v. Paine*, 29 Gratt. 302 (1877); and see, *Gill v. Continental Gas Co.*, L. R. 7 Ex. 332 (1872); *Gray v. Stone*, (1893) W. N. 133.

³ *Bidstrup v. Thompson*, 45 F. 452 (1891); *Cornick v. Richards*, 3 Lea, 1 (1879).

⁴ *Coleman v. Spencer*, 5 Blackf. 197 (1839); *Fiske v. Carr*, 20 Me. 301 (1841); *Showhagan Bank v. Cutler*, 49 Me. 315 (1860); *Finber v. Essex Bank*, 5 Gray, 373 (1855); *Boyd v. Rockport Mills*, 7 Gray, 406 (1856); *Beauchard v. Dedham Gas Light Co.*, 12 Gray, 213 (1858); *Rock v. Nichols*, 3 Allen, 342 (1862); *Newell v. Williston*, 138 Mass. 240 (1885); *Application of Murphy*, 51 Wis. 519 (1881); and see *Weston v. Bear River Co.*, 5 Cal. 186 (1855), where the same rule was laid down, but modified on rehearing in 6 Cal. 425.

notice of a prior assignment have been held superior to those of the party claiming under such assignment.¹

(*e.*) In the following cases the party claiming under the seizure had notice of the prior transfer, and his rights were therefore held inferior to those of the prior transferee.²

(*f.*) In those cases where notice of the prior transfer is held to determine the rights of the party claiming under the seizure, there is a diversity of opinion as to when such notice is material. Some courts hold that notice at any time before the *sale* under the seizure binds the purchaser,³ while others hold that notice after the seizure is of no consequence.⁴

(*g.*) When the rights of the party claiming under the seizure are made dependent on his having no notice of a prior transfer, as in the cases under (*d.*), (*e.*) and (*f.*), it is clear that the protection of the corporation from liability to the holder of the original certificate in consequence of its issue of a new one is entirely inadequate. Such protection depends upon a fact which the corporation has no means of determining, viz.: notice to one party of the rights of the other.

(*h.*) Where the rights of the assignee of the certificate are held superior to those of a party claiming under a subsequent

¹ *Ditney v. First Nat. Bank*, 20 South. R. 476 (1896); *Naglee v. Pacific Wharf Co.*, 20 Cal. 529 (1862); *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600 (1881); *Northrop v. Newtown Turnpike Co.*, 3 Conn. 544 (1820); *Trimble v. Vandegrift*, 7 Howst. 451, 32 A. 632 (1887); *People's Bank v. Gridley*, 91 Ill. 457 (1879); *People v. Goss Mfg. Co.*, 99 Ill. 355 (1881); *Fort Madison Lumber Co. v. Batavian Bank*, 71 Ia. 270, 32 N. W. 336 (1887); *Pinkerton v. R. Co.*, 42 N. H. 424 (1861); *Buttrick v. Nashua & Lowell R. R.*, 62 N. H. 413 (1882); *Sabin v. Bank of Woodstock*, 21 Vt. 353 (1849), *semble*; and see, *Parker v. Sun Ins. Co.*, 42 La. Ann. 1172, 8 S. 618 (1890).

² *Black v. Zacharie*, 3 How. 482 (1845); *Bridgewater Iron Co. v. Lisberger*, 116 U. S. 8 (1885); *Ditney v. First Nat. Bank*, 20 South. R. 476 (1896); *Weston v. Bear River Co.*, 6 Cal. 425 (1856); *People v. Elmore*, 35 Cal. 633 (1866); *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600 (1881); *Blakeman v. Puget Sound Iron Co.*, 72 Cal. 321, 13 P. 873 (1887); *Plymouth Bank v. Norfolk Bank*, 10 Pick. 454 (1830); *Dickinson v. Central Nat. Bank*, 129 Mass. 279 (1879); *Newberry v. Detroit Mfg. Co.*, 17 Mich. 141 (1866); *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454 (1877); affirmed 74 Mo. 77; *Scripture v. Soapstone Co.*, 30 N. H. 571 (1871); *Rogers v. N. J. Ins. Co.*, 8 N. J. Eq. 167 (1849); *Cheever v. Meyer*, 52 Vt. 66 (1879); *Van Cise v. Merchants' Nat. Bank*, 4 Dak. 428, 33 N. W. 897 (1887).

³ *Wilson v. St. Louis & S. F. R. Co.*, 108 Mo. 528, 18 S. W. 226 (1892).

⁴ *Jones v. Latham*, 70 Ala. 164 (1881); *Central Nat. Bank v. Williston*, 138 Mass. 244 (1885).

seizure, such assignee may lose his rights, in some jurisdictions, at least, by failure to take steps to protect himself. In *Friedlander v. Slaughterhouse Co.*,¹ the transferee before levy had notice of the execution sale. The purchaser at the execution sale obtained a decree against the corporation requiring the issue of a new certificate to him. The corporation appealed from the decree, but the transferee of the original certificate took no steps to protect his rights, and the decree against the corporation was affirmed. It was held that the transferee of the certificate had lost his right of action against the corporation by his own neglect.

In *Noble v. Turner*,² the transferee of the certificate brought a bill to compel the transfer of the stock to him. The bill was dismissed because the stock had been sold seven years before upon execution against the registered owner, and the complainant was, therefore, held guilty of laches.

In *Cleveland, etc., R. Co. v. Robbins*,³ however, it was held that the statute of limitations does not begin to run in favor of the corporation and against the transferee of the certificate until the corporation actually refuses to recognize the transfer, or the transferee has notice that the stock has been transferred to other parties, and this seems the more reasonable rule.

In some States, as in Alabama,⁴ the transfer must be recorded within a certain time in order to be good against a creditor without notice. In Colorado the transfer must be recorded within sixty days, or it will not be good even against a creditor with notice,⁵ unless the transferee has done all in his power to procure registration.⁶

Inasmuch as the corporation has no means of determining whether the transferee has slept on his rights or not, such rules afford it no adequate protection.

¹ 31 La. Ann. 323 (1879).

² 69 Md. 519, 16 A. 124 (1888).

³ 35 Ohio St. 483 (1880).

⁴ *Berney Nat. Bank v. Pinckard*, 87 Ala. 577, 6 S. 364 (1889); *White v. Rankin*, 90 Ala. 541, 8 S. 118 (1890); *Abels v. Plasters' Ins. Co.*, 92 Ala. 386, 9 S. 423 (1891).

⁵ *Conway v. John*, 14 Col. 30, 23 P. 170 (1890); *First Nat. Bank v. Hastings*, 7 Col. App. 129, 42 P. 691 (1895).

⁶ *Weber v. Bullock*, 19 Col. 214, 35 P. 163 (1894).

(i.) In some States an equitable interest in stock may be seized.¹ In Rhode Island it seems that the rights of the purchaser at judicial sale of such equitable interest are regarded as superior to those of a *subsequent* transferee of the certificate,² which is an exception to the general rule that purchase of the legal title for value and without notice cuts off equities. The corporation is protected in such cases, however, because the purchaser of the equitable interest thus seized cannot demand a certificate of stock.³

(j.) In Rhode Island the officer's deed to the purchaser of stock at an execution sale is held to vest the *title* to the stock in the purchaser.⁴ The corporation is bound to record the deed, but is not obliged to issue a new certificate of stock.⁵ This rule seems decidedly unsatisfactory. On the one hand, the execution purchaser is left without any certificate for his stock, the transfer of which is thereby rendered more difficult; while, on the other hand, it is not clear that the corporation is protected from liability to a transferee of the certificate claiming by assignment before the seizure.

(k.) By reason of the doctrine of relation, a seizure of the stock may operate to defeat a prior transfer of the certificate. In *Memphis Appeal Co. v. Pike*,⁶ an execution levied in July was held superior to a transfer in June, because the levy related back to April 1st, the date of the execution.

(l.) The results of the foregoing decisions with reference to the liability of the corporation for issuing a duplicate certificate may be summed up briefly. The only doctrine which gives absolute protection to the corporation against liability to the holder of the original certificate is that stated in (c). Only where that doctrine prevails is the right of the holder of the new certificate indisputably superior to that of the holder of

¹ *Poster v. Potter*, 37 Mo. 526 (1866); *National Bank of New London v. Lake Shore, etc., R. Co.*, 21 Ohio St. 221 (1871); *Beckwith v. Burroughs*, 14 R. I. 366 (1884).

² *Beckwith v. Burroughs*, *supra*.

³ *National Bank of New London v. Lake Shore, etc., R. Co.*, *supra*.

⁴ *Lippitt v. American Wood Paper Co.*, 14 R. I. 301 (1883); *Beckwith v. Burroughs*, 14 R. I. 366 (1884).

⁵ *Beckwith v. Burroughs*, *supra*.

⁶ 9 Heisk. 697 (1872).

the old. In all other cases the relative rights of the two claimants to the stock are made to depend upon some fact which the corporation has no adequate means of determining. The important fact may be the priority of the transfer over the seizure, or notice to the creditor of the transferee's rights, or laches on the part of the transferee; but in any case the fact is one as to the existence of which the corporation must decide at its peril. Now rule (c) bears so harshly on innocent purchasers that the tendency both of legislation and of judicial construction is to reduce its application to a minimum, thus diminishing the protection to the corporation in case of the duplication of certificates. The injustice to the corporation in compelling it to assume the risk of liability to the transferee of a certificate of stock by requiring it to issue a new certificate to a person claiming under a seizure of the stock is clear. The injustice, however, is the creation of statute, and it is to legislation, therefore, that we must look for a remedy which the courts have no power to give.

(*u.*) What remedy, then, is to be sought for this unfortunate condition of affairs? The fate which has overtaken so many mighty schemes of law reform ought to inspire diffidence in any one who is minded to improve the law; yet to criticize the law without offering any suggestions for its betterment is permissible only to a layman. The suggestion that I would venture, with all deference, to make is a simple, yet a radical one.

Had the decisions of Lord Hardwicke governed his successors, and had the opinions of Chancellor Kent controlled American courts of equity, much of the difficulty that has arisen in regard to the transfer of stock might have been avoided.¹ It is clear that a debtor's choses in action ought to be subject to the claims of his creditors; but the common law had no means of reaching choses in action. It is hard to conceive of a clearer case for the application of equitable relief than this, yet such relief has been generally denied. The injustice of courts of equity in refusing such relief has induced the legislature to provide statutory remedies for the creditor. Unfor-

¹ *Bigelow on Fraud*, II. 70-76.

tunately, the statutory remedies have been processes like attachment and execution which are adapted in their nature only to the seizure of corporeal property. In the case of stock the injustice wrought by these statutory remedies has been pointed out. The most satisfactory method for protecting the creditor, the purchaser, and the corporation seems to be this. Abolish all seizure of stock by process *in rem*, and remit the creditor to a court of equity for relief. If the registered owner of stock is the real owner, the creditor would then reach the stock by a creditor's bill. The decree would require the defendant to transfer the certificates to the creditor, or to a receiver who should offer them for sale. Duplication of certificates in consequence of our present legislation requiring the issue of new certificates without the cancellation of the old would then cease. Such duplication is clearly recognized by the courts as an injustice to the corporation, and they will not compel it in the absence of statute.¹

II. SEIZURE OF STOCK CERTIFICATES.

One word must be said in regard to the second theory concerning the seizure of stock, that stock may be seized by seizing the certificates. It is generally held that stock can be seized only at the domicile of the corporation, and that the seizure of the certificates cannot affect the title to the stock.² In Louisiana, however, stock may be seized either in the usual manner, by notifying the corporation, or by seizing the certificates.³ And in Minnesota the garnishment statutes of that State have recently been held to apply to certificates of stock in foreign corporations. In *Puget Sound National Bank v. Mather*,⁴ the garnishee held certificates of stock in a Wash-

¹ *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183, 46 N. W. 337 (1890); *Bean v. American Loan & T. Co.*, 122 N. Y. 622, 26 N. E. 11 (1890).

² *Voumkin v. Collier*, 47 F. 571 (1891); *Winnlow v. Fletcher*, 53 Conn. 390, 4 A. 250 (1886); *Reid Ice Cream Co. v. Stephens*, 62 Ill. App. 334 (1895); *Smith v. Downey*, 8 Ind. App. 179, 34 N. E. 823 (1893); *Armour Bros. Packing Co. v. St. Louis Nat. Bank*, 113 Mo. 22, 30 S. W. 690 (1892); *Plimpton v. Bigelow*, 93 N. Y. 592 (1883); *Christmas v. Biddle*, 13 Pa. St. 223 (1850); *Ireland v. Globe Milling Co.*, (R. L.) 32 A. 921 (1895); *Moore v. Gennett*, 2 Tenn. Ch. 375 (1875); *Young v. So. Tredegar Iron Co.*, 85 Tenn. 189, 2 S. W. 202 (1886).

³ *Harris v. Bank of Mobile*, 5 La. Ann. 539 (1850).

⁴ 60 Minn. 362, 62 N. W. 396 (1895).

ington corporation, which had been pledged to it by the principal defendants as collateral security for a debt. The court held that the garnishment was proper; that the certificates were property of the defendants in the hands of the garnishee, and that they could be seized accordingly. The court further intimates that such certificates could be seized on attachment or execution. If this decision could stand, the difficulties arising from the duplication of stock certificates might be avoided. The sheriff could seize the certificates of stock, sell them on execution, and transfer them to the purchaser at the execution sale, who would then surrender them to the corporation and receive new ones. But the decision of the Minnesota court can no more affect the title to stock in a Washington corporation than it could affect the title to land in Washington. Stock in a Minnesota corporation may be seized in Minnesota by seizing the certificates; stock in a Louisiana corporation may be seized in Louisiana in the same way; over such property the legislature and the courts of the State have control. But the judgment of a court of one State cannot affect the title to property in another State; and it is too well settled to admit of argument that the situs of the stock for purposes of seizure is the domicile of the corporation. The owner of the stock in the Minnesota case would simply be in the position of a man whose certificates were lost or stolen. He would remain the owner of the stock, and should be entitled to a new certificate therefor upon proper terms.

13. COMPULSORY DUPLICATION OF CERTIFICATES IN CONSEQUENCE OF SUPPOSED LOSS OR DESTRUCTION OF ORIGINALS.

Where a certificate of stock has been lost or destroyed, it is generally held that the corporation must issue a duplicate certificate. Statutes exist in some jurisdictions authorizing the courts to compel the issue of duplicate certificates in such cases. On general principles, however, it seems that a court of equity has jurisdiction to decree that a duplicate certificate shall be issued in such cases.¹ The question then arises as to

¹ *Klimes v. Forty-second St. R. Co.*, 140 N. Y. 183, 35 N. E. 408 (1893); *Galveston City Co. v. Shiley*, 36 Tex. 269 (1862).

the effect of the original certificate, which may be still outstanding. Suppose that the registered owner of stock by alleging that he has lost his certificate procures a duplicate, and then transfers the two certificates to different purchasers for value and without notice? It seems that the prior transferee would have the prior equitable right, but that if either transferee acquired the legal title to the stock in consequence of the recognition of his transfer by the corporation, his title would not be disturbed. What then is the right of the innocent purchaser of the other certificate? Clearly he has a right of action against the corporation in accordance with the general principles stated in § 1.¹ It follows that a bond of indemnity should always be required by the corporation of the person who seeks to compel the issue of a duplicate certificate in consequence of the alleged loss or destruction of the original. Where the court acts in the exercise of its general equity jurisdiction this bond is generally, and should be always required.² In England the custom seems to be to require indemnity only in the absence of satisfactory proof of loss.³ In New York, in addition to the equitable remedy, the statute of 1873, c. 151, provides a summary remedy for the stockholder, but requires indemnity. In Minnesota the Act of 1893, c. 45, requires indemnity; but in case the certificate has not been heard of for seven years no indemnity need be given.⁴ In Louisiana no indemnity is required.⁵ In Missouri it has been held, not by the court of last resort, that even the giving of indemnity will not entitle the stockholder to a new certificate in regular form,

¹ *Keller v. Bureka Brick Co.*, 43 Mo. App. 84 (1890); *Briehane v. Delaware, L. & W. R. Co.*, 94 N. Y. 304 (1883); *Cleveland & M. R. Co. v. Robbins*, 35 Ohio St. 483 (1880); *Galveston City Co. v. Sibley*, *supra*; *Greenleaf v. Ludington*, 15 Wis. 558 (1862). The *dictum* to the contrary in *Guilford v. Western Union Tel. Co.*, 59 Minn. 332, 61 N. W. 324 (1894) is unsound and opposed to the more reasonable view taken by the same court in *Joslyn v. Distilling Co.*, 44 Minn. 186, 46 N. W. 377 (1890).

² *Guilford v. Western Union Tel. Co.*, 43 Minn. 434, 46 N. W. 70 (1890); *Galveston City Co. v. Sibley*, 56 Tex. 269 (1882); where no new certificate was issued, but the cause was kept standing on the docket for the protection of the corporation.

³ See *Société de Paris v. Walker*, 11 A. C. 20 (1886); *London v. Prov. Tel. Co.*, L. R. 9 Eq. 653 (1870).

⁴ *Guilford v. Western Union Tel. Co.*, 59 Minn. 332, 61 N. W. 324 (1894).

⁵ *Phillips v. New Orleans Gas Light Co.*, 25 La. Ann. 413 (1873).

but that the new certificate must be marked "duplicate" and refer to the decree authorizing it.¹

Although a bond of indemnity offers some protection to the corporation issuing a duplicate certificate in place of one alleged to be lost, such protection is not always required, and may prove inadequate. How then shall the corporation be protected and the rights of the stockholder who has lost his certificate be preserved at the same time? The attempted solutions of this problem do not seem to have been very successful. If a new certificate is issued in the form prescribed by the Missouri court, it will be unmarketable. The Supreme Courts of Minnesota and Louisiana have met the difficulty by assuming that a transferee of the original certificate could acquire no rights against the corporation,² an assumption manifestly unsound. In New York the Act of 1873, c. 151, provides that when a new certificate is issued, and a bond of indemnity given, the holder of the original certificate shall have no further claim against the corporation, but shall be remitted to the bond of indemnity. This provision has been attacked by Mr. Thompson³ as unconstitutional, involving the taking of property without due process of law. The criticism seems just. If A. is the registered owner of stock, and B. buys his certificate, B. acquires a right to demand a transfer of the stock on the books of the corporation. This is a right of property, a chose in action, and cannot be taken from B. by a proceeding to which he is not a party.

There seems to be only one way to protect both the corporation and the stockholder who has lost his certificate. An act might be passed providing for an equitable proceeding in the nature of a bill to quiet title. A bill of this kind, brought by the registered owner against the corporation and the "unknown claimants" to the stock, would enable the court to enter a decree barring the rights of any transferee of the original certificate, and thus protecting the corporation.

Northwestern University Law School, Edward Avery Harriman.
Chicago, February 1, 1897.

¹ *Keller v. Eureka Brick Co.*, 43 Mo. App. 84 (1890).

² *Gulford v. Western Union Tel. Co.*, 39 Minn. 339, 61 N. W. 324 (1894);
Phillips v. New Orleans Gas Light Co., 28 La. Ann. 413 (1873).

³ *Corporations*, § 2524.

THE POSSIBILITY OF NEW LEGAL OBLIGATIONS.

SECOND PAPER.¹

*"With respect to them (Progressive Societies) it may be laid down that social necessities and social opinion are always more or less in advance of Law. . . . Law is staple; the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed."*²

IV.

In my first paper on this subject I attempted to point out three things: First, that what we know as law, legal right and obligation, grew out of our economic and social conditions, and not out of *a priori* theories of right and wrong. When "conditions" changed the law might change also. Second, that the present century had experienced profound changes in methods of production which, on the whole, tend to concentrate the direction of industry in a comparatively small number of persons. The conclusion drawn was that we might reasonably look to the director of industrial enterprise, or *entrepreneur* and the buyer of his products on the one hand; and the *entrepreneur* and his workmen on the other, for changes in legal conceptions. Third, an examination of the cases dealing with the *entrepreneur* as a seller disclosed the fact that already the legal right of an owner to sell at the price he could get was beginning to be modified in the face of altered economic conditions. I also tried to point out the extent of the possible modification. In the present paper I desire to take up the second part of my subject, and see what effect, if any, the changed conditions of production have had, or are likely to have, on the legal obligations of employer and employed. And first to examine somewhat more closely than in the former paper the economic changes affecting these obligations.

The tendency towards large productive establishments, the elimination of smaller producers in many lines of industry, the

¹ First Paper in the January Number, p. 1.

² Maine's Ancient Law, Chap. 2, p. 23.

combination and consolidation of the large producers in a single industry, results, as I have heretofore pointed out, in a decrease, relatively speaking, of the class which directs industry, and an increase of the class which labors for others. In one industry after another the *bourgeoisie* class of small employers, is passing away. This means that, on the whole, there is less chance for a workman at the end of the nineteenth century, than there was at the beginning, to move out of his class and become an employer on his own account. It is a natural result of these changes that our time has witnessed the first organized effort on the part of workmen to better their class as a class. In past centuries the natural leaders among the workmen devoted their energies to getting out of their class. The efforts of trade unions have been, among other things, to obtain better terms from the employers. The weapon or club which has been used to accomplish this object has been the strike, or simultaneous abandonment of work. The ability to strike in a body is essential, under modern conditions, to secure careful consideration of demands from employers before refusal. Under existing laws, there is a complete freedom of contract, not between the employer and the whole body of his employees, but between the employer and each employee. The place of a single individual in any trade or industry can be easily filled. If the man is dissatisfied he may leave and, if he can, find work elsewhere on better terms.

The strike, however, has some features about it which have already rendered it an impossible remedy in many employments. At the best it is a rough cure. Production, on which the progress of the community depends, stands still while producers wrangle among themselves. It reminds one of the practice prevalent among primitive communities, and used in India under the name of *Dharma* down to the English occupation. If a debtor of social position failed to pay his debt, the creditor starved himself at the door of his debtor until he died or was paid. But aside from its crudity the strike is invariably accompanied by certain evils to the whole community. In the first place, a peaceful strike is out of the question. There are

always some men willing to take the strikers' places, and it is past human nature as at present manifested for men peaceably to stand by and see their places filled by those whom they regard as traitors to all they themselves hold dear. Judge Jenkins in, *Farmers' Loan and Trust Company v. Northern Pacific Co.*,¹ says, "It is idle to talk of a peaceful strike; none such ever occurred. A strike is essentially a conspiracy to extort by violence; the means employed to effect the end being not only the cessation of labor by the conspirators, but the necessary prevention of labor by those who are willing to assume their places." Mr. Justice Harlan, when the case came before him in the Circuit Court of Appeals, refused to take this view, saying that the court had no evidence from which they could assert as a matter of law that all strikes were illegal as being necessarily accompanied by violence.² But the great mass of lay minds, and I am inclined to think the great mass of judicial ones also, will conclude that Judge Jenkins was right, and that a strike without violence may indeed be thinkable but is practically never attainable. Indeed, it may be seriously questioned, whether if workmen on a strike invariably stood by and peaceably allowed their places to be taken by others, the strike as a means of affecting a desired end would be worth anything.

But, besides the violence which seems to be the necessary concomitant of a strike, there is another equally serious feature, which arises from the new facts of our industrial organization. The economic changes of the nineteenth century have not been confined to turning small factories into large. There has been a division of industry, as well as a combination of industrial establishments. Where one industrial plant began and completed a product, now several separate industries are represented in almost everything which we use. Take, for instance, a house. In the first part of the century the saw-mill and the carpenter almost sufficed to complete it. Now, we have the structural iron-worker (who may depend

¹ 60 Fed. 803, p. 821. See a criticism of this case by the author, 33 Amer. Law Reg. & Rev. 81.

² *Arthur v. Oakes*, 63 Fed. 310, p. 326-7. See also *Sir James Hannan v. Farrer v. Close*, L. R. 4 Q. B. 600, p. 612.

on the foundryman for the supply of his raw material, who in turn, depends upon the miner; the brickmaker; the terracotta worker; the mill worker; the stone mason; the bricklayer; the carpenter; not to mention others on the regularity of whose labor the work of all may not depend. It is recognized by every one that all industry depends on the business of transportation. Stopping the wheels of our locomotives means stopping all trade and industry. Transportation is the most striking instance of the interdependence of industry; but in a less degree this interdependence is true of any other industry, and tends to become more true every day.

What may be said of the dependence of one industry upon another may also be said of each industry in its internal organization. Once there were few trades which did not include the knowledge of the whole process of manufacture from the raw product of the industry to the completed product. A shoemaker knew how to make a shoe, even from cutting out the leather to the last stitch. Now one set of men know how to feed the cutting-out machine, another how to heel the shoe, while still another run the machines which sew the uppers on the soles. Again, we find that transportation affords the most striking example of the general drift of things. On every railroad work is so divided that each man does only a small portion of the whole business, but, as in the shoe factory, the whole depends on his keeping at work. A few engineers or a few switchmen ceasing to work will paralyze a whole railroad system. The result is an ever-growing importance to a widening circle of persons that a particular class of workmen should keep at work, and an ever-growing possibility of harm from the strike even of a few men.

These being our new conditions, how has the law dealt with them? It required no new legal conception to declare that a workman had no right to lay violent hands on an employer's property, or to declare it a crime for him to use threats and violence against one who would work for his former employer. In repressing violence and intimidation when occurring in respect to strikes, the only develop-

ment of the law has been on the side of the remedy and punishment. Striking employees and officers of their unions have been served with injunctions commanding them to refrain from acts of violence and trespass on property, and placed in prison for contempt when the mandate of the court has been disobeyed. Though this involves no new substantive legal conception, it is, nevertheless, a startling development of legal remedies and is, I believe, an indication of the character of what will be new legal obligations on the part of both workmen and employer. It will, therefore, be profitable to note the outline of the development of injunctions as applied to restrain the violence of strikers, and the reasons which influenced the judges to extend their equitable powers. The first injunctions served on strikers both in this country and England were, oddly enough, injunctions restraining acts which bordered on libel—the very thing of all others which a court of equity will not restrain. In *Springhead Spinning Co. v. Riley*,¹ Vice-Chancellor Malins restrained the striking employees of the complainant company from posting signs throughout the city advising workmen not to apply for employment at the complainant's mill. The ground of the decision was that the act, which was in pursuance of a boycott, was unlawful, and, being a continuing injury to the property of the complainant, for which there was no adequate remedy at law, an injunction should be granted. In the first American case of any importance, *Sherry v. Perkins*,² the defendants were enjoined from displaying a banner in front of complainant's premises with the inscription, "Lasters are requested to keep away from P. P. Sherry's, per order of L. P. U." Judge Allen says: "The banner was a standing menace to all who were or wished to be in the employment of the plaintiff, to deter them from entering the plaintiff's premises. Maintaining it was a

¹ L. R., 6 Eq. 551. Reversed on the ground of restraining a libel: *Prudential Assn. Co. v. Knott*, L. R. 10 Ch. App. 142.

² 147 Mass. 212 (1888). The earliest case that we know of is *New York, Lake Erie and Western R. R. Co. v. Wenger*, 17 Wk. Law Bul. (Ohio), 307, (1887.) Judge Stone, of the Cuyahoga County Court, issued an injunction restraining the ex-employees of a railroad company from trespassing on the property of the company for the purpose of preventing freight cars from being moved by non-union hands.

continuous unlawful act, injurious to the plaintiff's business and property, and was a nuisance such as a court of equity would grant relief against." The idea on which the equity jurisdiction of the court was based in these cases was that of a continuing nuisance. In the first case, the posters would have stayed up indefinitely; in the last, the banner had been displayed for more than three months in front of the plaintiff's premises before the bill was brought.¹

The next step was to restrain threatened acts of violence destructive of property. In 1885, Judge Brewer, then Circuit Judge for the Eighth District, had committed strikers to prison for contempt in that they had entered the property of a railroad with a view of hindering the running of trains by intimidating the employees. The railroad was in the charge of the court under a receiver.² The ground for the imprisonment was the duty of the court to see that property committed to its charge was protected. As reported, no prior injunction had been issued. The power of the court to commit arose out of the peculiar circumstance that the property was in the custody of the court. Yet the case was one of those on which the important case of *Carr d'Alene Consolidated & Mining Co. v. Miners' Union of Wardner*,³ rested. This case grew out of the Idaho mining riots of 1892. In the bill to restrain the strikers from molesting the property or intimidating the workmen a condition of anarchy was set forth, which makes the assertion of Judge Beatty that he was not restraining a crime curious reading. The mine property had been attacked, workmen dragged forth, marched to the borders of the state, and then turned adrift in a wild and uninhabited country. Yet, the opinion of the court regarded

¹ See also for a similar case of publishing hand-bills: *Casey v. Typographical Union*, 45 Fed. 135; *Steamship Company v. McKennan*, 30 Fed. 48, was a case of mailing threatening letters. For a case refusing an injunction against publishing notices that the defendant was employing non-union labor, see *Richter Bros. v. Journeymen Tailors' Union*, 24 Wk. Law Bul. 189 (1890).

² *United States v. Kane*, 23 Fed. 748.

³ 51 Fed. 260 (1892). See for a case restraining on a motion for a preliminary injunction laborers from conspiring to prevent the employment by a steamship company of men not in the union: *Rider v. Whitelaiden*, 75 Fed. 724 (1895).

the question involved as "whether the acts complained of considered as unlawful and not criminal may be restrained." The injunction was issued on the ground that frequent repetitions of the acts might be expected. Prior cases, among them *United States v. Kane*, which was not a case of injunction, was cited to show that equity will restrain wrongs by strikers. Yet this case had important differences from such a case as *Sherry v. Perkins*. In the former the act was a continuous one; in the latter a repetition was only feared. But more important yet, in the previous case, the acts complained of were such that any officer of the police force would not have thought of interposing. The acts might have been indictable, but that would not have been known until an indictment had been brought. In this case the acts complained of, in spite of the opinion that they were not criminal, did subject the strikers to immediate arrest and warranted the calling out of the United States troops. These differences may not be material, but they are differences, and mark the progress of the use of the injunction to quell the unlawful acts of strikers.¹

The celebrated injunction issued in the great Chicago strike of 1894, was the first injunction ever issued at the instance of government. Its purpose was to assist the executive arm in restoring order.² In the court below the right to issue such an injunction had been placed on the ground of the statute of 1890,³ commonly known as the Interstate Commerce Act. The first section declares that every combination in restraint of commerce between the states is illegal, and the fourth section provides that, "The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys . . . to institute proceedings in equity to prevent and restrain such violations. . . ." The court, through Judge Wood, expressly refused to place their

¹ For a more extended discussion of this case see article by present writer in 31 Amer. Law Reg. & Rev. 782, on Injunction to Restrain Libels and Courts of Criminal Equity.

² *In re Debs*, 158 U. S. 564-571 (1895).

³ 26 Statutes at Large, 509; U. S. v. *Debs*, 64 Fed. 724.

injunction on grounds outside the statute, because of lack of precedent,¹ and Judge Baker, in another case, growing out of the same injunction,² declares that "prior to the second day of July, 1890, it is entirely clear that the United States, as a municipal corporation, had no power, either by petition or bill, to go into the courts of equity of the United States and invoke the aid of these courts, by their restraining power, to prevent interference with the carriage of the mail, or with the carriage of interstate commerce." Yet, when the case came into the Supreme Court of the United States on *habeas corpus*, that court, through Mr. Justice Brewer, preferred to rest their judgment on broader grounds than the act. Justice Brewer maintained that the relations of the federal government to the mail and to interstate commerce were such that the government was justified in a direct interference to prevent a forcible obstruction. "The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or transportation of the mails." He then proceeds to state that where the power exists the government is not limited to executive action, but may appeal to a court of chancery to aid the executive in the enforcement of the law. Where the necessity exists, the court will issue an injunction restraining those who are threatening, or who are defying the authority of the government. The court refused to rest their decision on the fact that the United States Government has a property in the mails, but rested it on the broader ground that "every government entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of one and the discharge of the other." . . . It is safe to say that, had this power been claimed by the courts in the days when the executive was wielded by those who would oppress the people, rather than maintain order, the chancery would have been expressly abolished along with the star chamber, as the right-hand instrument of tyranny.

¹ Page 745.

² *United States v. Alger*, 62 Fed. 824.

It is not our purpose here, however, to criticise or justify the action of the court in the Debs case, either on the ground of precedent or expediency. The result of this and prior cases is all that we are interested in. The injunction is no longer confined to private hands or the hands of municipal corporations, or to cases where the present damage to property is under color of right. A state, or national government, when the subjects under the control of Congress are affected, can obtain an injunction restraining strikers from acts of violence.

In all the cases which we have reviewed, the persons restrained were the leaders of the unions and brotherhoods as well as the strikers. In the Debs case the proceedings for contempt were against Debs and other leaders of the American Railway Union. After the injunction had been served on them they still continued to encourage the strike. Their speeches and telegrams showed, on the whole, that they had done nothing to deter their followers from stopping trains. They, however, had done nothing on which it is likely that an indictment for inciting to crime could have been successfully maintained. Their conviction on the evidence leads to the conclusion that, if after an injunction is issued, the leaders still encourage the strike, and any violence is committed, the leaders will be held to have violated the injunction and render themselves liable to commitment for contempt. Of the efficiency of an injunction in ending a strike there can be no doubt. As practically every strike is accompanied by violence, the issuance of an injunction either causes the leaders to end the strike or lands them in jail. The result of the Chicago strike, shows that if the leaders are arrested the strike is at an end. The testimony before the United States Commission of Inquiry is very eloquent on this point. "As soon as the employees found that we were arrested, and taken from the scene of action, they became demoralized, and that ended the strike. It was not the soldiers that ended the strike, it was not the old brotherhoods that ended the strike; it was simply the United States Courts that ended the strike." It may be that the outcry against government by injunction will force the passage of acts submitting all contempt cases to a jury,

but it is unlikely that the power of the court to issue the injunction will be taken away. The evil of strikes is too great, and the efficacy of the injunction to restrain these evils too manifest. The conservative forces of the country will lean towards upholding the power.

What efficacy the strike had, therefore, has been practically taken away by these decisions, as far as the transportation industry is concerned.¹ They have not, as has been stated, altered, at least consciously, the obligations and rights of the parties to a labor contract. Those rights, as at present usually expressed, are simple in the extreme. The employer can hire whom he wants, on what terms he wants. He can terminate the employment at any time, being liable only to civil damages if he breaks a contract for a longer period. On his part the employee sells his services for what he can get, to whom he wants, and can break the relation at any time, subjecting himself only to civil damages for the breach of contract. Let us examine, however, one or two recent cases.

In the early part of 1893, the engineers on the Toledo, Ann Arbor and Northern Michigan Railroad struck. The strike was ratified by Arthur, the chief of the Brotherhood. He sent out a telegram to the employees on the connecting lines, ordering them to enforce Rule 12. Rule 12 provided that when there was a strike on the road, which strike was approved by the head of the Order, the members who were employed on the other lines should refuse to handle cars from the line on which the strike had been inaugurated. As a result of Arthur's telegram, the companies connecting with the Ann Arbor line notified that company that they would not handle their cars, because their men would strike. The Ann Arbor Company then filed their bill in equity petitioning the court to restrain the connecting companies, their officers and

¹ Should our courts follow the recent English case of *Lyons v. Wilkins*, L. R. 1 Ch. 811, (1896), we might say that the courts had destroyed the efficacy of any state. The striking employees of a manufacturing company through the officers of their union were restrained from "watching or besetting the plaintiff's works for the purpose of persuading or otherwise preventing persons from working for him, or for any purpose except merely to obtain or communicate information. . . ." It should be said that this injunction was issued under Conspiracy and Protection of Property Act § 7, Int. § 4.

employees from refusing to handle their cars. The injunction was granted on the ground that under the Interstate Commerce Act it was the duty of all roads to handle interstate freight and passengers.¹ Three employees of the Pennsylvania Railroad Company were proceeded against for contempt of the injunction in refusing to handle the Ann Arbor cars. According to the facts found by the court three of the defendants had taken their engines out of the round-house and proceeded to the yard where they were ordered to take out a train containing cars from the boycotted road. The defendants refused and resigned from the road. Another defendant was ordered to pick up a car at a particular junction. On arriving at the junction, he found it was an Ann Arbor car. He held his train and refused to obey the order. Later in the same day he received permission from an officer of the Brotherhood to haul the car which he immediately did. Before investigating the facts, Judge Ricks made an address on the scope of the injunction; in which he said, "You are engaged in a service of a public character, and the public are interested not only in the way you perform your duty, while you continue in that service, but are as much interested in the time and circumstances under which you quit that employment. You cannot always choose your own time and place for terminating these relations." Further in his opinion in the case, the same judge says²: "In ordinary conditions as between employer and employees the privilege of the latter to quit the former's service at his option cannot be restrained by force . . . but these relative rights and powers may become quite different in the case of employers of a great public corporation charged by the law with certain great trusts and duties to the public." Noticing the power of a few men, such as engineers, to cripple a road and paralyze industry, he says, "If such ruin to the business of employers, and such disasters to thousands of the business public, who

¹ Toledo, Ann Arbor & Northern Michigan Railroad Company v. Penna. Ry. Co. et al., 34 Fed. 746, 1893. For a more extended review of this and the subsequent case see an article by the present writer entitled: *The Courts and Striking Railroad Employees*, 32 Amer. Law Reg. & Rev. 41.

² Page 752.

are helpless and innocent, is the result of a conspiracy, combination, intimidation, or unlawful acts of organized employees, the courts have the power to grant partial relief¹” In the other reported case growing out of the same trouble,² Judge Taft points out that if a workman “uses the benefit which his labor is or will be to another by threatening to withhold it, or agreeing to bestow it, or by actually withholding or bestowing it, for the purposes of producing, procuring, or compelling that other to commit an unlawful or criminal act, the withholding or bestowing his labor for such a purpose is itself an unlawful or criminal act. . . .”³ The conclusion from these statements is two-fold. From Judge Ricks we gather that a combined strike paralyzing industry may, in his opinion, be illegal, on account of the disaster such an act will cause; and from Judge Taft, that refusing singly or in a body to work because an employer will not enforce a boycott, is illegal. Both judges refused to extend the powers of a court of equity to restrain men from leaving the employ of the railroad company on the ground that this would be an order to keep men at work. The court does undertake to force them to perform their duty as employees while they remain such. Thus, Judge Ricks, while he dismissed the case against the three engineers who resigned rather than handle Ann Arbor cars, imposed a fine on the man who refused to handle such a car in the middle of a trip. Judge Taft ordered Arthur to rescind his telegram enforcing the boycott. The Brotherhood generally refused to obey the order of the court, but Arthur obeyed the order to rescind the boycott and the trouble was at an end.

It must be confessed that the refusal of the court to order the men not to strike, to put in force a boycott, in view of the length which the court did go in its restraining order, leaves an

¹ Page 753.

² *Toledo, Ann Arbor & N. M. R. Co. v. Peana Ry.*, 54 Fed. 730.

³ In *Temperton v. Russell*, L. R., 1 Q. B. 715 (1883), it was held that an action lay against the officers of a trade union for enforcing a boycott against the plaintiff's mill. An injunction against members of the union was refused: *Ib.* 435. In *Flood v. Jackson*, L. R., 23 B. 21 (1895), a workman recovered against an officer of a union who had procured his discharge.

unsatisfactory impression, though the line drawn by the court is logically clear. It is equally a crime injuring property to refuse to handle a particular car and remain in the employ of the company and to combine with others and leave the employ, not for the purpose of severing your relations with the company, but to force the company to commit a crime. And not only are both acts criminal, but both acts are similar and have the same object.¹ Judge Jenkins in *Farmers' Loan and Trust Company v. Northern Pacific Railroad Company*,² took this view of the matter when he came to the conclusion that all strikes were illegal because they were a conspiracy to compel. He restrained the employees and their organization from "combining or conspiring together, or with others, either jointly or severally, or as committees, or as officers of any so-called labor organizations, with design or purpose of causing a strike."³ As we have seen, Mr. Justice Harlan annulled this order, not on the ground, however, that it was keeping men at work, but on the ground that all strikes were not illegal. He expressly says, that if strikes were what Judge Jenkins thinks them to be, the order of injunction, so far as it relates to strikes, is not liable to objection as being in excess of the power of the Court of Equity."

It would, therefore, seem that where a strike is for an illegal purpose, it is likely that the court will now restrain the strike itself by injunction, even though such action practically involved an order to remain at work. It also seems that the minds of our judiciary are fast coming to the opinion that all strikes are illegal. The Chicago strikes and the Debs Case add little to our information on these points. The case settled the fact that a combined conspiracy to quit work on a railroad, crippling interstate commerce, was a crime; it upheld the right of the court of equity to aid the government in the enforcement of civil order; but the injunction being skillfully drawn, carefully avoided ordering the men to continue at

¹ *Southern Cal. Ry. Co. v. Rutherford*, 62 Fed. 795 (1894), was a case in which Judge Ross, under similar circumstances, followed the *Ann Arbor* Case.

² 60 Fed. 873 (1894).

work in so many words. The principal clause of the restraining order says: "From compelling or inducing, or attempting to compel or induce, by threats, intimidation, or *persuasion*, force or violence, any of the employees of said railroads to refuse or fail to perform any of their duties as employees in respect to interstate commerce and mails." But the line between such an injunction and compelling a man to work until his ceasing to do so does not cause great public inconvenience is a narrow one. That a combination to refuse to work, as far as the employees of a transportation industry is concerned, is a crime seems to be established, whatever the powers of the court, and this is only another way of saying, that there is a right on the part of the employer to the continuance of the employees' services, until his leaving does not cause serious embarrassment.

Some will say that this is the return to a form of slavery. That is true, if the new obligation to continue to work is not to be followed by a recognition of a corresponding right on the part of the employed to have the conditions of his employment determined by some one besides the employer. That the right to compulsory adjustment of disputes between employers and employed in those industries where the right to strike is effectually repressed will not be obtained, is almost unthinkable. The economic facts, which we have pointed out, tend to place much power for harm in the strike of a few employees. The cases which we have been over show a legitimate effort on the part of the court to meet this new condition. That effort is not going to stop when the courts have satisfied the new needs of one class. Already we hear the demand for compulsory arbitration between companies and their employees where the companies are exercising a public franchise. Justice Harlan, in one of the cases of which we have been speaking, asserts his belief in the right of the government to fix the rate of wages of railroad employees by statute, or to prohibit leaving companies at will.¹ Indeed,

¹ *In the absence of legislation to the contrary, the right of one in the service of a quasi public to withdraw therefrom . . . and the right of the managers to discharge an employee must be deemed absolute: Arthur v. Oakes, 63 Fed. p. 319 (1894).*

if present economic tendencies continue, there seems no reason to doubt but what in time the contract of one man for the labor of another will be a contract, the main outlines of which will be settled by a court, or by legislative enactment. This will not arise from any fondness for paternalism or any form of socialism, but simply from the fact that conditions make it of vital public importance that the relations between an employer and his men should continue without serious dispute or violent interruption. We can lay it down as a general proposition that whenever the terms of a contract or its continuance are vital to the progress of the State, the State will see to the terms of the contract, in spite of that inborn prejudice in favor of *laissez faire*, the outgrowth of conditions which surrounded our ancestors.

William Draper Lewis.

Philadelphia, February 1, 1897.

A CONSTITUTIONAL QUESTION IN CONNECTION WITH THE TORRENS SYSTEM OF LAND REGIS- TRATION.

In a paper read before the American Bar Association at its meeting in 1890, Dwight N. Olmstead, Esq., declared the Torrens System of Land Registration, (an account of which has been recently given in this magazine by Charles C. Townsend, Esq.) to be, on account of its provision for the examination of titles before admitting them to registry, impracticable in this country. Amongst other things Mr. Olmstead said: "No title, which has heretofore, for any considerable period of time, been dealt with according to the common law, can, with any certainty as to its condition, be entered on a register without a careful and reliable preliminary examination. All registry-of-title systems provide for such examinations. They may be made in countries where the transfers have been few and the ownerships large and capable examiners are employed, with comparative safety. But it is obvious that in such large cities as New York, where there are not far from 200,000 titles to land separately held, or even in smaller cities, prior examinations sufficiently reliable on which to warrant judicial decrees or state guarantees, would be impossible. In short, the Torrens system is not practicable, at least in this country:" Reports Am. Bar Ass'n., Vol. XIII., p. 271 *et seq.*

At the time Mr. Olmstead wrote, no one of the United States had adopted the Torrens system or any modification of it, but in 1895 the State of Illinois passed an act adopting in effect the Torrens system, and the feature criticized by Mr. Olmstead, having encountered and overcome the legislative objection of impracticability, has been assailed in court as unconstitutional, on account of the method provided for the examination and passing upon title before registry.

The Illinois Act of June 13, 1895, (Laws of Ill., p. 107.) provides that the owner of an estate or interest in land, legal

or equitable, and whoever has a power of appointment in fee simple, may apply to the Registrar of the county in which the land is situated, by a sworn application setting out, *inter alia*, a description of the land, the estate or interest of the applicant in the same; whether the land is occupied or unoccupied; if occupied, by whom; whether the land is subject to any lien or incumbrance, giving the name and address of the holder thereof and, if recorded, the book and page of the record; and whether any other person has any estate or claims any interest in the land in law or equity in possession, remainder, reversion or expectancy, and if any, the address of said person and the nature of his estate or claim; that upon such application the Registrar shall cause examination to be made into the applicant's title and shall notify all persons, named in the application as having an interest in a lien or claim upon the land, of said application and post a copy of the notice upon the premises; the examiners shall then report upon the title; if they find defects therein, they are to give the applicant a reasonable time within which to remove them before finally passing upon his application; when the Registrar is satisfied of the validity of the applicant's title, he is to issue to him a certificate of title; if the Registrar be not satisfied, he is to dismiss the application without prejudice. After the issue of the certificate the registered owner shall hold subject only to such estates, mortgages, liens, charges and interests, as are noted in the certificate, and free from all others except any lease, written or verbal, not exceeding five years, under which there is an actual occupation, public highways, any easement, however created, upon, over or in respect of the land, any tax or assessment for which a sale of the land had not been had at the date of the certificate of title, the right of action or counter-claim allowed by the act, and the right of any person in possession of and rightfully entitled to the land or any part thereof or any interest adverse to the title of the registered owner, at the time when the land is first brought under the act and continuing in said possession until the issuance of the last certificate of title. The act further provides that, with the exceptions before mentioned, no person shall

bring any action to recover land or assert any interest, or right in, or lien or demand upon the same or make entry thereon adversely to the title or interest certified in the first certificate bringing the land under the operation of the act, unless within five years after the first registration; and, further, that any person having any interest, right, title, lien or demand, whether vested, contingent or inchoate, in, to or upon registered land, existing at the time the land was first registered, but upon which no right of action had accrued at the date of registration, may, prior to the expiration of five years after the registration, file in the Registrar's office a sworn notice of his claim, and may bring an action to assert, recover or enforce the same at any time within one year after the right of action shall have accrued or within five years after the first registration and not afterwards.

Enough of the Illinois Act has been above set forth, it is thought, to enable the reader to understand the basis of the attack made upon the statute. The attack took, *inter alia*, the shape of a *quo warranto* to the Recorder of Deeds of Cook County for the purpose of ousting him from the office of Registrar of Titles (which by the act was vested in the Recorder,) on the ground that, as the statute required the Registrar, before allowing land to be registered and so brought within the operation of the act, to examine the title and be satisfied of its validity, judicial functions were conferred upon him, and that, as the Constitution provided that the judicial power should be vested in courts therein named or indicated, the act was unconstitutional as an attempt to vest judicial powers in an administrative officer. This contention met with success in the Supreme Court, which court held that what was required of the Registrar was the exercise of a judicial function. In arriving at this conclusion the court relied mainly on the following definition of judicial power given by Judge Cooley, viz.: "The power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws."

An examination of the matter will, it is thought, show that the conclusion of the court is supported neither by a consid-

eration of what is meant by judicial power in the constitutional sense, nor by the definition given by Judge Cooley, when its terms are carefully attended to.

The endeavor of the framers of our federal and state governments was, undoubtedly, to separate, so far as practicable, the different departments of government and to carefully and positively define and distinguish from each other the executive, legislative and judicial departments. For all practical purposes the endeavor has been a success, and sufficient lines of demarcation have been established, but, nevertheless, such is the complexity of human affairs and business that it has been found impossible to keep the different powers, (if we define each power as an abstraction), from ever coming into contact. If, therefore, we regard as judicial, everything which involves a decision in the sense of making up the mind and causing such making up to have some effect upon the rights of others, we shall find that many acts are under our governmental system required to be done by officers who are not courts or parts of courts, the legality of which acts is unquestioned. Take, for example, the acts required of the Controller of the City of Philadelphia, whose duty is defined in *The Century Company v. Philadelphia*, 38 Weekly Notes, 431, to be "to see that the various departments do not exceed their appropriations, nor apply them to purposes not within their proper scope." This certainly involves the duty on the part of the Controller of examining a bill presented to him for work directed by a department of the city administration, and of deciding, before he signs the warrant for payment for the same, whether the work is or is not within the scope of the department ordering it. So far as his action in signing or refusing to sign the warrant is concerned, it certainly has an effect, if not on the absolute right of the contractor with the department, at least upon the means to which he will have to resort to enforce his rights, if he have any.

Other examples of the same thing will readily occur to the reader—the action of the Register of Wills in admitting or refusing to admit to probate a will, the action of a Sheriff in distributing a fund in his hands, the action of the Auditors in

different departments of the federal executive government, and, as a very marked example indeed, the action of the Patent Office through its examiners and commissioner in the issue of a patent. These and other instances may be given of the exercise of powers, which can be sustained as legal, only if the phrase, judicial power, has in its constitutional use and sense a technical and more confined meaning than one which would embrace every case where there is an exercise of judgment, in the popular sense, after a consideration of facts, and that exercise has some effect upon the right of another.

This position is abundantly supported by authority. In *United States v. Ferreira*, 13 How. 40, it was held that an act of Congress empowering the district judge of Florida to examine and adjudge claims arising under the Florida treaty, and report his decision; when favorable, to the Secretary of the Treasury for his discretionary action thereon did not confer on the district court judicial power in the constitutional sense. The court, after referring to *Hayburn's Case*, 2 Dall. 410, and notes thereon, said: "The powers conferred by these acts of Congress upon the judge as well as upon the Secretary are, it is true, judicial in their nature; for judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to Commissioners appointed to adjust claims to lands or money under a treaty, or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a secretary as well as a commissioner, but it is not judicial in either case in the sense in which judicial power is granted by the Constitution of the United States." Again in *Murray's Lessee v. Hoboken Land and Improvement Company*, 18 How. 280, the distinction between the two senses in which the expression, judicial power, may be used is recognized. In delivering the opinion of the court, CURTIS, J., says: "That the auditing of the accounts of a receiver of public money may be in an enlarged sense a judicial act must be admitted. So are the administrative duties, the performance of which involves an inquiry into the exist-

ence of facts and the application to them of rules of law. In this sense, the act of the President in calling out the militia under the Act of 1795, or of a commissioner who makes a certificate for the extradition of a criminal under a treaty is judicial. But it is not sufficient to bring such matters under the judicial power that they involve the exercise of judgment upon law and fact: " See, also, *Taylor v. Place*, 4 R. I. 324; *Owners of Land v. People*, 113 Ill. 296, (and cases cited); *Hawthorn v. People*, 109 *id.* 302; *In re Clark*, 65 Conn. 34; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307; *Reed v. Morton*, 119 Ill. 118.

From this point of view, it is manifest that very little light can be shed upon the subject by those English cases which speak of the action of the Registrar being not only ministerial but judicial, for as the powers of government are not, in England, limited by any written constitution, and, as there is nothing to prevent Parliament conferring judicial powers, in any sense, upon a ministerial officer, the courts cannot distinguish between the two senses of judicial power which exist in this country, for in England the distinction does not exist.

What, then, is meant by judicial power in the constitutional sense, the judicial power which can constitutionally be exercised by courts only?

In answering this question, it is to be borne in mind that the judicial power is always spoken of and regarded in our constitutions, whether federal or state, as an attribute of government—the *government* is divided into the executive, legislative and judicial departments. Remembering, then, that what we are to define is a governmental function, the answer would seem to be, that judicial power in the constitutional sense is the power to make a decision in a controversy between parties, which shall, by its own force, be final and binding between said parties until reversed by the judgment and decision of a superior judicature. Final and binding, that is, without the necessity of any supplemental action or inaction on the part of any person or officer to bring about that effect. If, after the decision, it rests with any person or officer to put it into effect or not, then the action formulated in the so-called deci-

sion is not a judicial action in the constitutional sense. This is illustrated by *United States v. Ferreira*, (*supra*.) The district judge heard testimony, examined and passed upon claims under the treaty, and certified his "decision," when favorable, to the Secretary of the Treasury, but, as it rested with the Secretary whether he would or would not act upon the "decision" of the judge, the action of the latter in making the decision was not in the constitutional sense judicial. To this characteristic finality of judgment or decision, in view of the fact that the judicial power we are considering is a function of a special department of government, should be added the authority on the part of the court or institution to carry into effect its decision or decree, either by means of its own officer or by an imperative direction to an executive officer. When we have the union of the right to decide, finally, between parties with the right to authoritatively direct the final decision, when made, to be carried into effect by force, we have judicial power in the full constitutional sense. If the power conferred upon an officer, or body of commissioners or governmental department, lack either of the above qualities, the power conferred is not judicial in the constitutional sense, although in its exercise it may require an examination of law and fact, and the application of one to the other.

Applying what has gone before to the duties and powers of the Registrar, under the Illinois statute, let us see whether he is vested with judicial powers in the constitutional sense. In the first place, does he make any decision which, by its own vigor, either vests or divests rights of parties? It is true that he is required, with the assistance of examiners learned in the law, to investigate a title presented to him for registry, to give notice to parties having claims to or liens upon the land of the applicant for a certificate, and to post a notice on the premises at least ten days before granting a certificate, and to refuse a certificate if he be not satisfied that the title is good and valid; but what is the effect of his decision either to grant or refuse a certificate? Does it vest or divest any right? It does of itself neither. If the Registrar refuse a certificate, then the act says "he shall dismiss the application without

prejudice and return the papers to the applicant," deciding nothing. If the Registrar grant a certificate, does it bar any adverse rights or give forthwith to the recipient any right or title which he had not before the grant of the certificate? Not at all; it merely starts, as to him and in his favor, except as against estates, liens and interests mentioned in the certificate and certain statutory exceptions, a period of limitation, within which any claim, any title, can be urged by suit against his certificated title or possession, but on the expiration of which his title becomes, except as above indicated, indefeasible. The fixity of his title is due to the running of the period of limitation. Before the termination of that time the certificate is not even *prima facie* evidence of title; possession with it is no stronger than possession without it; at the end of the period the certificate becomes conclusive. Have we here anything which is contrary to the ordinary course of the running of the statute of limitation, except that it requires a matter of record to start it, and is this the only case in which a privilege is attached to land or obtained by the owner thereof by means of a record? An example of so obtaining a privilege at once occurs in the statute providing that where the ownership of land in the city of Philadelphia is registered in the Registry Bureau, the land shall not be sold for taxes except after suit against the registered owner, a privilege not possessed by non-registered land. Does the fact that care is to be taken before permitting registry convert the act of registry from an administrative to a judicial action? Another example prompts a negative answer. Patents are not issued until after the claims of the inventor are examined by skilled officials, questions of interference or priority may be passed upon by the commissioner, but that does not render the action of the Patent Office judicial; the patent may be attacked, the invention shown not to be that of the patentee, an interference be shown in the court, just as freely as if the patent had not been granted, or as if the practice were to grant patents to all who applied for them, leaving their recipients to fight out question of right amongst themselves in the courts, without any prior examination in the Patent Office.

Assuredly, then, it is not in accordance with the analogies of the law in similar cases to hold that because an act which is to start the running of a period of limitation looking to the quieting of title is carefully guarded that, therefore, it is to have less effect than the same act would have if performed without such guards. It cannot be questioned that the Legislature has power to pass a statute of limitations of any reasonable character, or that it can make any act the starting-point of the running of the period of limitation. There would be nothing unreasonable in the enactment that the filing of a title, with due notice by one in possession, or even without notice, should be a bar to all actions for land not bought within a given period, and that thereafter the land should be brought within the act and be transferred according to its provisions. This, in effect, was the simple plan suggested by Mr. W. Strickland Cookson, in 1857, *i. e.*, to place possessory titles on the register upon an affidavit of the supposed owners as to their condition and to allow them to mature by lapse of time, careful official supervision being given to intermediate transfer. This, according to Mr. Olmstead, was substantially followed by Mr. Charles F. Brickdale in his *Registration of Titles to Land* (Lond., 1886,) and appeared in the statement of the Land Laws by the Council of the Incorporated Law Society of the United Kingdom (Lond., 1886,) and is apparently also approved by Mr. Olmstead himself. This being the case, how the requirement of care and examination, before permitting a land owner to proceed to bring his land within the protection of a new system of registration and transfer can make that which, without such care, was perfectly legal, illegal and unconstitutional, seems hard to comprehend, when we bear in mind the distinction between judicial powers in the general and in the constitutional sense.

It remains to say a few words upon the support given to the theory that the Registrar's action is judicial, by the definition quoted by Judge Cooley, to quote it again: "The power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws." Now this definition to stand (and we believe it will

stand without giving much aid to the theory for which it is cited), must be taken as a whole and read so that the protection afforded is to be regarded as a consequence of the adjudication; for it is manifest that other departments of government do, in a very practical sense, often protect the rights and interests of individuals, without exercising of judicial power. Now adjudicate has a technical and special meaning. In the Latin, *adjudico* is to adjudge or award a thing to one; *as judge* to declare it to be his. Andrew's Lexicon, giving as authority, Cicero, Livy, Suetorius. *Abjudico* is to give sentence as judge against one; to declare that he has forfeited something. Worcester gives the following definitions: *Adjudicate*, to sentence, to adjudge, to pass judgment; *adjudge*, (1) to give or award by the decision of a judge or umpire; (2) to settle, to determine, to decree by judicial sentence; (3) to condemn, to sentence; (4) to judge, to deem. Webster gives the following: *Adjudicate*, to adjudge, to try and determine as a court, to try and determine judicially; *adjudge*, to decide or determine in the case of a controverted question, to decree by judicial opinion. The Century Dictionary: *Adjudicate*, to adjudge, pronounce judgment upon, award judicially, to sit in judgment, give a judicial decision; *adjudge*, (1) to award judicially, assign; (2) to decide by a judicial opinion or sentence, adjudicate upon, determine, settle; (3) to pass sentence upon, sentence or condemn; (4) to deem, judge, consider; (rare), to decree, decide, pass sentence.

It will be observed that primarily all the definitions look to the action of a court or judge, in the popular sense, to the decision of a cause between parties, a decision which *determines* a question of right in favor of one as against the other party; a decision which has finality; a decision, the carrying out of which may be compelled by the power which has rendered it. That Judge Cooley used the word "adjudicate" in this sense, is not only probable from the general use of it, but is apparent from his coupling it with the idea of protection—"adjudicates and protects." The judicial power first declares what is the right of the individual before it, and then by its process puts him in possession of his right, or protects him in its enjoy-

ment. Taking, then, the word "adjudicate," in the sense in which Judge Cooley must have used it, there is nothing in the quotation which at all supports the theory it is called upon to support, for the Registrar determines and enforces no right; he has no compulsory process to bring persons before him and to compel them to show their rights or their claims; he issues no execution, or process after he has given his certificate of title, moved thereunto by the petition of the land owner, he bars by his certificate no right, he simply declares that the applicant has convinced him, the Registrar, that he has a certain title, and that title is upon record, if within the period fixed by the statute no action is brought for the land, the title becomes unassailable by the operation of the statute of limitation, and, thereafter, the land is to be sold and transferred by a new, convenient and economical method, instead of by the cumbersome and expensive one at present employed.

Considered upon general principles, or even taking the definition of judicial power, attributed to Judge Cooley, as conclusive, it does not seem to us that the functions given to the Registrar of Titles, are, in the constitutional sense, judicial, and it is to be hoped that the Supreme Court of Illinois, before whom a motion for a reargument of the question is pending, may not adhere to its first expressed opinion and so impede the progress of what many consider one of the great legal reforms of the age.

Henry Budd.

Philadelphia, February 1, 1897.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR JANUARY.

**Banks and
Banking,
Receiving
Deposits
When
Insolvent,
Constitutional
Law**

The Supreme Court of Illinois has recently made a very thorough examination of the act of that state of June 4, 1879, P. L. 113, which enacts (§ 1) that "If any banker or broker or person or persons, doing a banking business, or any officer of any banking company, or incorporated bank doing business in this state, shall receive from any person or persons, firm, company, or corporation, or from any agent thereof, not indebted to said banker, broker, banking company, or incorporated bank, any money, check, draft, bill of exchange, stocks, bonds, or other valuable thing which is transferable by delivery, when at the time of receiving such deposit, said banker, broker, banking company, or incorporated bank is insolvent, whereby the deposit so made shall be lost to the depositors, said banker, broker, or officer so receiving said deposit, shall be deemed guilty of embezzlement, and upon conviction thereof shall be fined, in a sum double the amount of the sum so embezzled and fraudulently taken, and in addition thereto, may be imprisoned in the state penitentiary, not less than one nor more than three years. The failure, suspension, or involuntary liquidation of the banker, broker, banking company, or incorporated bank within thirty days from and after the time of receiving such deposit, shall be *prima facie* evidence of an intent to defraud, on the part of such banker, broker, or officer of such banking company or incorporated bank." This it holds to be constitutional, not being a deprivation of property without due process of law, in that it curtails an inherent right to contract, nor violating the provision that the right of trial by jury shall remain inviolate, nor that that no person shall be deprived of life, liberty, or property without due process of law.

It was also held that an indictment under this act alleging that the accused corruptly, wilfully, fraudulently and feloniously received a deposit, etc., was sufficient, without specifically alleging that the deposit was received with intent to defraud; that an allegation that the accused, "being persons then and there doing a banking business did receive" from one D. certain moneys, of the property of said D., the said D. then and there not being indebted to the accused, sufficiently alleged that the accused were doing a banking business, and that the moneys were received as a general deposit; and that an indictment alleging that the accused were doing a banking business under the name of "Meadowcroft Bros.," and that they were insolvent at the time they received the deposit, was sufficient, without alleging that the partnership of Meadowcroft Bros. was insolvent, as a partnership is not a legal entity, independent of the persons composing it.

It was further held that the crime denounced by the act is consummated when the banker receives the deposit, and is unable, by reason of his insolvency, to repay the entire sum deposited; that it is not necessary to demand the return of the deposit, when the day after the deposit a receiver was appointed for the bank, which was hopelessly insolvent; that a deposit was lost to the depositor, so as to warrant a conviction of the banker for receiving it, though pending the prosecution therefor the full amount of the depositor's claim was tendered to him; and that a general verdict fixing the amount of the fine (which by the act is double the amount of the deposit,) and the term of imprisonment, without finding as to the amount of the deposit, was valid: *Meadowcroft v. People*, 45 N. E. Rep. 303.

Statutes of this kind are to be found in most, if not all of the states of the Union, and it has been uniformly held that the provision that subsequent failure shall be *prima facie* evidence of insolvency at the time of the receipt of the deposit does not render them unconstitutional: *State v. Beach*, (Ind.) 43 N. E. Rep. 949, 1896; *State v. Buck*, 120 Mo. 479, 1894

In order to sustain a conviction, the state must prove beyond a reasonable doubt

- (1) Actual insolvency at the time the money is received ;
- (2) The defendant's knowledge of the insolvency ;
- (3) The receipt of the money as a bank deposit : *Commonwealth v. Junkin*, 170 Pa. 194, 1895, reversing 16 Pa. C. C. 116, 1895.

When a banker or officer of a bank receives money over the counter at a time when he knows the bank to be insolvent, but keeps it separate from all other funds, with the intention of returning it, and actually does return it, he cannot be convicted of a criminal receipt of the money as a bank deposit ; and if a clerk, against the order of the defendant, receives a deposit and fails to keep it separate, but the next day the amount of the deposit is returned to the depositor by the banker, the latter is not guilty : *Commonwealth v. Junkin*, 170 Pa. 194, 1895, reversing 16 Pa. C. C. 116, 1895. It is not necessary, however, to constitute a violation of the statute, that the deposit should be received in the bank building or rooms ; a receipt of money on deposit for the bank outside of its rooms is sufficient : *State v. Yetzer*, (Iowa,) 66 N. W. Rep. 737, 1896 ; *State v. Smith*, (Minn.) 64 N. W. Rep. 1022, 1895. And it is not necessary that the defendant should receive it himself ; if any one under his authority, as a cashier or clerk, receives it, he is liable : *State v. Cadwell*, 79 Iowa, 432, 1890. Partners who are bankers may accordingly be jointly guilty of committing the offence denounced ; one by directing, aiding or advising, the other by actually receiving the deposit : *State v. Smith*, (Minn.) 64 N. W. Rep. 1022, 1896. Under the Missouri statute, which provides, that "if any officer . . . shall create or assent to the creation of any debts or indebtedness by any such bank . . . in consideration of or by reason of which indebtedness any money or valuable property shall be received into such bank, he shall be guilty of larceny," (Rev. Stat. Mo. 1889, § 3581,) it has been held that it is the duty of an officer, on becoming aware of the failing condition of the bank, to revoke the authority of any employe under him and subject to his authority to receive any further deposits ; and

his failure to do so will be construed as a continuing authority to receive them, and as an assenting thereto: *State v. Sattley*, 131 Mo. 464, 1895.

A firm engaged in banking is insolvent, within the meaning of these statutes, when it is unable to meet its liabilities as they become due in the ordinary course of business; and bankers who receive deposits, knowing themselves to be thus insolvent, cannot escape the penalty of the law on the ground that they believe that, with time and indulgence, they can settle all demands: *State v. Cadwell*, 79 Iowa, 432, 1890. A deposit is "lost" to the depositor, whenever it cannot be repaid on demand, owing to the insolvency of the bank: *State v. Beach*, (Ind.) 43 N. E. Rep. 949, 1896.

The mere act of receiving a deposit when insolvent does not constitute the offence. Without any special provision to that effect, the Supreme Court of Nebraska has held that the statute of that state forbidding the receipt of deposits by an insolvent bank, ought not to be construed to render an officer of a banking association guilty of a crime for permitting a debtor of the association to pay his debt thereto, even though the association is at the time, to the officer's knowledge, insolvent; and that the rejection of evidence tending to show that the deposit was received in payment of a debt to the bank is error: *Nichols v. State*, (Neb.) 65 N. W. Rep. 774, 1896. To the same effect is *Commonwealth v. Schall*, 12 Pa. C. C. 209, 1892; *Commonwealth v. Delamater*, 2 D. R. (Pa.) 118, 1892. But the indebtedness of a depositor to the bank, within the meaning of the exception in the statute, must be such that the bank has a legal right to apply the deposit thereon, such as a matured obligation, so that the depositor has no right to have the deposit repaid on demand, and it is consequently not "lost" to him by the bank's insolvency: *State v. Beach*, (Ind.) 43 N. E. Rep. 949, 1896.

The officers of national banks are amenable to these statutes, since Congress has not by any legislation declared it to be criminal to receive a deposit knowing or having reason to believe the bank insolvent, and its exclusive jurisdiction has therefore not attached: *State v. Bardwell*, 72 Miss. 535, 1895;

and further, such acts are not void on the ground that they are attempts to control and regulate the business of national banks, and to prescribe a condition on which deposits may not be received: *State v. Fields*, (Iowa,) 62 N. W. Rep. 653, 1895. The owner of a private bank is liable, though he is doing an unauthorized business, not having complied with the requirements of the statute in the organization of his bank: *State v. Buck*, 108 Mo. 622, 1891; *State v. Buck*, 120 Mo. 479, 1894; but a trust company, not authorized to receive deposits, is not a bank or banking institution within these statutes, though it has and exercises some of the functions of a bank; and the fact that it receives deposits subject to check in violation of its charter, does not render it a banking institution, so that its officers are amenable thereunder: *State v. Reid*, (Mo.) 28 S. W. Rep. 172, 1894.

An indictment, though charging the offence in the exact language of the statute, is fatally defective if it fails to aver the essential fact that the bank was actually insolvent: *State v. Bardwell*, 72 Miss. 535, 1895; and in case of a general partnership, it must be averred that both the partnership and the individuals composing it are insolvent; but in case of a special partnership the averment of the insolvency of the firm alone is sufficient: *Commonwealth v. Delamater*, 2 D. R. (Pa.) 118, 1892. Unless the statute so provides, however, the indictment need not allege that loss occurred to any one by reason of the receipt of the deposit: *State v. Myers*, 54 Kana. 206, 1894. A charge that the defendants were "engaged in the business of carrying on a private bank," does not sufficiently allege that they were "bankers" within the meaning of the act: *Commonwealth v. Delamater*, 2 D. R. (Pa.) 118, 1892. Under the Missouri statute, which makes it a criminal offence for any officer of a bank to "receive or assent to the reception of any deposit of money," etc., knowing the bank to be insolvent, a conviction cannot be had on an indictment which merely charges that the defendant did "receive" the deposit, on proof that he "assented" to the reception thereof; the two offences are distinct: *State v. Wells*, (Mo.) 35 S. W. Rep. 615, 1896; and if the indictment charges that money was received "on

deposit and for safe-keeping," it must be proved that the money was received for safe-keeping, or as a special deposit, and proof of a general deposit is insufficient: *Koetting v. State*, 88 Wis. 502, 1894.

In prosecutions under these acts, a deed of assignment made by the defendant, under the general assignment law, the inventory, appraisement, and all proceedings had thereunder, are competent evidence on the question of the defendant's insolvency; *State v. Beach*, (Ind.) 43 N. E. Rep. 949, 1896; *State v. Cadwell*, 79 Iowa, 432, 1890. So, evidence that depositors demanded their money, and that the bank employes refused to pay them, is competent to show the failure of the bank to meet its obligations in the ordinary course of business, and this, whether the defendant personally heard the demands or not: *State v. Sattley*, 131 Mo. 464, 1895. A bank is not necessarily insolvent, however, because it does not retain on hand all of the money of its depositors; its is not expected to pay all its depositors at once, but simply to pay or provide for its deposits and other debts as they are demanded in the usual course of business; *State v. Myers*, 54 Kan. 206, 1894; and in deciding the question of solvency, the capital stock and surplus fund of a bank are not to be considered as liabilities tending to show insolvency. The capital and surplus are resources, which may be used to pay depositors and other creditors when there has been loss by loans or otherwise: *State v. Myers*, 54 Kan. 206, 1894.

The opinion of a witness as to the insolvency of the bank is not admissible. The actual facts concerning the condition of the bank at the time of the deposit must be shown: *State v. Myers*, 54 Kan. 206, 1894. But an expert accountant, who has examined the books of the bank, with reference to its solvency, at different times, may, in connection with the *data* upon which his opinion is founded, testify as to his opinion concerning the solvency or insolvency of the bank: *State v. Cadwell*, 79 Iowa, 432, 1890.

An instruction that a bank is not insolvent so long as it is meeting its liabilities as they become due in the ordinary course of business, and there is reasonable expectation on the

part of the officers familiar with its affairs that it will continue to do so, is correct: *Minton v. Stahlman*, (Tenn.) 34 S. W. Rep. 222, 1896; and so is one that the failure of the bank "is *prima facie* evidence of the knowledge on the part of its cashier that the same was in failing circumstances," when it is explained that "*prima facie* evidence is such that it raises such a degree of probability in its favor that it must prevail unless it be rebutted or the contrary be proved:" *State v. Sattley*, 131 Mo. 464, 1895. When the deposit is in fact received by a cashier or clerk, it is sufficient to instruct the jury that the deposit must have been received on the authority of the defendant, and that he must have received it knowing of his insolvency: *State v. Cadwell*, 79 Iowa, 432, 1890.

The Iowa statute, (McClain's Ann. Code Iowa, §§ 1824, 1825,) differs from some others, in that it makes it an offence for "any officer or managing party" of the bank, who, knowing of its insolvency "shall knowingly permit the receiving of any such deposit as aforesaid." Under this statute it has been held, that an officer of an insolvent bank, who, knowing of its insolvency, permits or connives at the receiving of deposits, is guilty of the offence described, whether he is a managing party or not; that when the deposit in question is not received personally by the officer charged with the offence, it is not necessary that the person who actually receives it knows that the bank is insolvent, if the defendant knew it, and allowed such person to receive it for the bank; and that when an officer of a bank, knowing the bank to be insolvent, assists and advises the keeping of the bank open for the receipt of deposits, and while it is so kept open a deposit is received, that officer is guilty under the statute, though the deposit is actually received by another: *State v. Yetzer*, (Iowa,) 66 N. W. Rep. 737, 1896. Accordingly, it is proper to charge on the trial of a banker for receiving deposits when insolvent, that, though the deposit was received by the defendant's son, after the defendant had instructed him to refuse deposits, if the defendant, on learning that the deposit was so received, placed it among the funds of the bank, he knowingly accepted and received it: *State v. Eifert*, (Iowa,) 65 N. W. Rep. 309, 1895.

The provision that subsequent failure shall be *prima facie* evidence of insolvency applies to civil actions to recover the deposit, as well as to criminal prosecutions: *American Trust & Sav. Bk. v. Gunder & Paschke Mfg. Co.*, (Ill.) 37 N. E. Rep. 227, 1894.

The liability of a steamboat company with respect to the property of its passengers is analogous to that of an inn-keeper; and it will therefore be liable, without proof of negligence, if money for traveling expenses, carried by a passenger on a steamboat, is stolen from his stateroom at night, without negligence on his part: *Adams v. New Jersey Steamboat Co.*, (Court of Appeals of New York,) 45 N. E. Rep. 369, affirming 29 N.Y. Suppl. 56.

A statute making such an unreasonable reduction in the rates of toll charged by a turnpike company as will prevent it from maintaining its road, out of its receipts, in proper condition for public use, or from earning any dividend on its stock, is repugnant to the constitutional provision that no person shall be deprived of property without due process of law: *Covington & Lexington Turnpike Road Co. v. Sanford*, (Supreme Court of the United States,) 17 Sup. Ct. Rep. 198.

An order made by a state court, under authority of a statute, requiring a railroad company to surrender a portion of its right of way to private individuals, as a site for an elevator to be erected and maintained by such individuals for their own benefit, amounts to a taking of private property by the state without due process of law: *Mo. Pac. Ry. Co. v. State of Nebraska*, (Supreme Court of the United States,) 17 Sup. Ct. Rep. 130, reversing 29 Neb. 550.

The Supreme Court of Ohio has lately declared unconstitutional the act of that state of April 13, 1894, p. 135, in so far as it gives a lien upon the property of the owner to subcontractors, laborers, and those who furnish machinery, material, or tile to the contractor, irrespective of the contract between the owner and the contractor, on the ground that it

Carriers,
Liability for
Money Stolen

Constitutional
Law,
Due Process
of Law

Liberty of
Contract,
Mechanics'
Lien,
Subcontractors

liberty to acquire property by contract can be restrained by the legislature only so far as such restraint is for the common welfare and equal protection and benefit of the people. All to whom the contractor becomes indebted in the performance of his contract are bound by the terms of the contract between him and the owner: *Palmer v. Tingle*, 45 N. E. Rep. 313.

The Supreme Court of Missouri, Division No. 2, has recently decided, in *State v. Walsh*, 37 S. W. Rep. 1112, that the act of Missouri of March 12, 1895, which prohibits pool selling except "on the premises or within the limits or enclosure of a regular race course," is unconstitutional, being a violation of the provision of the constitution forbidding the enactment of special laws granting exclusive rights, privileges, or immunities.

The Supreme Court of Ohio has ranged itself on the side of those who hold that the legislature has no authority to abridge the power of a court created by the constitution to punish contempts summarily, since such power is inherent, and necessary to the exercise of judicial functions; and accordingly refused to adopt a construction of the Revised Statutes, (§§ 6906, 6907,) which would impute to the legislature an intention to abridge that power: *Hale v. State*, 45 N. E. Rep. 199.

In the same case it was also decided, overruling *Baldwin v. State*, 11 Ohio St. 681, 1860, that removing a witness from the county of his residence, where he was under *subpoena* to attend upon the trial of a cause pending, with the purpose and effect of preventing his appearance upon the day of trial, being a wrongful act, which obstructs the administration of justice, is a contempt of court.

The Supreme Court of Indiana, in *Stout v. Rayl*, 45 N. E. Rep. 515, has adopted the rule that when a deed is delivered by the grantor to a third person, to be delivered to the grantee on his death, and the grantor parts with all dominion over it, and reserves no right to recall it or alter its provisions, the title passes at

Exclusive
Rights

Contempt,
Inherent
Power of
Court,
Legislative
Interference

Removal of
Witness

Deeds,
Delivery,
Not to take
Effect till
Death

the time of the delivery of the deeds to the depository. The question arose upon the following state of facts. One S. delivered to his wife deeds executed by himself and her, with directions to keep them until his death, and then deliver them to W. The deeds were placed in an envelope, and indorsed, "Deeds to be delivered by W. after my death;" and on each deed were the words, "After my death, this deed to be delivered by W." After S.'s death, W. delivered the deeds to the grantees named therein; and it was held that the deeds were not invalid, as an attempt by the grantor to make a testamentary disposition of the land, without the legal formalities of a will.

The cases on this subject are collected in an annotation in 33 AM. L. REG. N. S. 141; see also 34 AM. L. REG. N. S. 638.

It is the duty of the secretary of state to certify to the county officers all nominations regularly presented to him; and if he refuses to do so, he may be compelled by mandamus. That remedy will still lie, though Elections, Nominations, Duty of Secretary of State a statute prescribes a different remedy, if the time is so short that the latter would prove ineffective: *People v. McGaffey*, (Supreme Court of Colorado,) 46 Pac. Rep. 930.

In this case, the Silver Republican party in Colorado held a convention, adopted an emblem, and made nominations, which were duly certified to the secretary of state. The Republican convention subsequently held adopted the emblem formerly used by the party, and made nominations which were also duly certified. Both parties had state organizations. The secretary of state refused to certify the nominations made by the Republican party, on the ground that it was superseded by the Silver Republican party. The latter then applied to the Supreme Court for a mandamus to compel him to certify them, which was granted, on the ground that the secretary had no authority to determine which of the two conventions represented the Republican party; and that the remedy was

vided by petition was inadequate, because of the nearness of the election.

In passing upon objections to certificates of nomination, the secretary of state is not confined to mere formal matters relating to such certificates, but may determine from extrinsic evidence whether the candidates therein named were in fact nominated by a convention called and held according to party usage, and claiming in good faith to represent a political party which cast the requisite number of votes at the last election: *State v. Piper*, (Supreme Court of Nebraska,) 69 N. W. Rep. 378; *State v. Piper*, (Supreme Court of Nebraska,) 69 N. W. Rep. 384; following *State v. Allen*, 43 Neb. 651, 1895; *Phelps v. Piper*, 48 Neb. 724, 1896. But it is no part of the duty of the secretary of state or of the courts to decide which of two rival state conventions of the

Rival Conventions same party so called and held is entitled to recognition as the regular convention; and if two rival factions of a political party in good faith nominate candidates at conventions so called and held in accordance with the usages of the party, and certify such nominations to the secretary of state, he will certify to the county officers the names of the candidates nominated by each: *State v. Piper*, (Supreme Court of Nebraska,) 69 N. W. Rep. 378; following *State v. Allen*, and *Phelps v. Piper*, *supra*. This rule has also been adopted by the Supreme Court of Kansas: *Sims v. Daniels*, 46 Pac. Rep. 952; which further holds, that the officers appointed to consider objections to nominations have no power to consider

Agreements of Candidates and enforce a written agreement made by the candidates and committees of opposing factions of a political party, providing for the settlement of their differences, and for a determination of the question as to which set of candidates is entitled to be placed on the official ballot, and to use the party name. Such a special tribunal cannot consider or enforce an agreement of candidates to withdraw on the happening of a certain event or contingency, even though such agreement is in writing. The Supreme Court of California, however, in opposition to the previous consensus of authority, holds that when certificates of nomination are presented to the registering officer by each of two conventions claiming to represent

the same political party, it is for him to determine which represents the party, at least in the first instance: *McDonald v. Hinton*, 46 Pac. Rep. 870.

When a person appointed by the county committee of a party to open and preside over a convention until the election of a temporary chairman refuses to recognize the authoritative character of the roll of delegates, but takes a *viva voce* vote on the question of the election of such chairman, and the majority of the delegates refuse to accept the chairman so elected, retire to another part of the house in which the convention is held, elect another chairman, and proceed to nominate candidates, the nominations so made are the regular nominees of the party, and their names are entitled to be placed on the official ballot, rather than those nominated by the delegates who remain under the first chairman: *French v. Roosevelt*, (Supreme Court, Special Term, New York County,) 41 N. Y. Suppl. 1080.

The Supreme Court of Ohio has recently decided that the act of that state of April 17, 1896, (Laws, p. 185,) prohibiting the printing of the name of any candidate more than once on the official ballot, is constitutional: *State v. Bode*, 45 N. E. Rep. 195.

In *Cook v. Fisher*, (Supreme Court of Iowa,) 69 N. W. Rep. 264, the initial of a candidate was printed as "R." on the official ballots, instead of "A.," his correct initial. At the election, some of the ballots cast were corrected by the judges of election by writing "A." before the "R." with pencil, others by writing "A." over the "R." in pencil, and the rest by stamping an "A." over the "R." with a rubber stamp. It was decided that, though the change thus created by the different methods of correction was distinguishable, yet, as no ballot in any one of the classes bore any marks which would distinguish it from other ballots of the same class, the ballots were not illegal on the ground that they bore identifying marks.

It was also decided that though the ballot law of Iowa, which prescribes particularly the manner in which the official ballots shall be prepared, corrected, furnished and used, and

provided that no other ballots shall be used or counted, is mandatory in so far as it requires certain officers to prepare and issue them in the prescribed manner, it cannot be construed as mandatory on voters in so far as it provides that no other ballots shall be used or counted, so as to deprive them of their right to vote because the officers who print the ballots have made a technical mistake in printing the name of a candidate on the ballot; and that accordingly the changes made by the judges did not necessitate the rejection of the entire vote of the township, on the ground that those changes prevented the ballots from being "official" ballots, and consequently rendered them illegal.

An electric light company is required to perfectly insulate its wires at points where persons are likely to come into contact with them, and to use the utmost care in doing so; and evidence that a person was injured by coming in contact with an electric light wire, and that the insulation of the wire had become defective at a joint, because the wrapping had become loosened, is conclusive proof that the company which maintained the wire was negligent in insulating it, if the wire is so situated that persons are liable to come in contact with it. *McLaughlin v. Louisville Electric Light Co.*, (Court of Appeals of Kentucky), 37 S. W. Rep. 851.

In a recent case decided in the Circuit Court of Appeals, Eighth Circuit, *In re Rowe*, 77 Fed. Rep. 161, the petitioner was extradited from Mexico, upon an information charging that he had counseled and advised another to commit the crime of embezzlement of public moneys, and upon affidavits tending to prove the facts alleged, which the Mexican authorities held to show the commission of the crime, and that there were suspicions that R. was an accomplice in its commission sufficient to justify his arrest and trial. After his return to the state of Iowa, where the crime was committed, and from which he had fled, R. was indicted for embezzlement, as a principal; the statutes of the state, (McClain's Ann. Code Iowa, § 5699,)

Electric Light
Wires,
Negligence,
Evidence

Extradition,
Trial for
Different
Offenses,
Principal and
Accessory

having abolished the distinction between principals and accessories, and making all concerned in the commission of a crime alike principals. Being held for trial under this indictment, R. applied to the Circuit Court of the United States for discharge on *habeas corpus*, on the ground that he was held for trial for a different offence from that for which he was extradited. The Circuit Court refused the writ, on the ground that the offences were not different; and this decision was affirmed by the Circuit Court of Appeals.

Judge Hanford, of the Circuit Court for the District of Washington, has lately ruled, that allegations in a petition for removal of a cause to that court, stating that the defendant has left the United States, and become permanently domiciled in the Dominion of Canada, now resides there, and intends to become a naturalized citizen of that country, does not show his alienage for the purpose of conferring jurisdiction on the federal court; since the mere fact that a defendant has, by removal from the United States, become a resident of a foreign country, does not make him a citizen thereof, for the purpose of federal jurisdiction: *Bishop v. Averill*, 76 Fed. Rep. 386.

Another attorney has been found bold enough, (or ignorant enough,) to assail the common law rule that a person who has inflicted upon another a wound from which death may and does ensue cannot defend a charge of murder on the ground that the deceased might have recovered had he been treated according to the most approved surgical methods. Of course, the court refused to listen to his claim: *State v. Edgerton*, (Supreme Court of Iowa,) 69 N.W. Rep. 280.

The Supreme Court of California has lately decided, that under Civil Code Cal. § 137, which authorizes a deserted wife to sue the husband for the maintenance of herself and of her children, if any, the wife is so far his creditor as to be within § 3439 of the Civil Code, which avoids conveyances made in fraud of creditors, and that a conveyance made by the husband with the

Federal
Courts,
Jurisdiction,
Citizenship

Homicide,
Defences

Husband and
Wife,
Fraud on
Rights of
Wife

design of defeating the wife's right of maintenance is avoided thereby; and that it is immaterial that the transfer was made before marriage, when there had been a previous agreement of marriage, followed by cohabitation and pregnancy, which left the wife no alternative but to carry out the agreement: *Murray v. Murray*, 47 Pac. Rep. 37.

The court also held that it is within the general powers of a court of equity to grant the wife's claim for maintenance, irrespective of the statute; and that it might appoint a receiver at the beginning of the action, since the plaintiff's demand might be charged specifically upon the defendant's property.

The Supreme Court of North Carolina has recently had before it a novel question. A husband brought an action for damages against a druggist, who, in violation of his express orders, sold laudanum and similar preparations to the wife, in consequence of which she became a confirmed victim of the opium habit, alleging the loss of her services and companionship. The court below sustained a demurrer to the complaint; but this was reversed on appeal: *Helleman v. Harvard*, 25 S. E. Rep. 972.

The reasoning by which the court supports its decision is worth quoting: "A married woman still owes to her husband, notwithstanding her greatly improved legal status, the duty of companionship, and of rendering all such services in his house as her relations of wife and mother require of her. The husband, as a matter of law, is entitled to her time, her wages, her earnings, and the product of her labor, skill, and industry. He may contract to furnish her services to others, and may sue for them, as for their loss, in his own name. And it seems to be a most reasonable proposition of law that whoever wilfully joins with a married woman in doing an act which deprives her husband of her services and of her companionship is liable to the husband in damages for his conduct. And the defendants owed the plaintiff the legal duty not to sell to his wife opium in the form of large quantities of laudanum as a beverage, knowing that she was, by using them, destroying her mind and body, and thereby causing loss to the husband.

Sale of Opium
to Wife.
Right of
Action by
Husband
Against Seller

The defendants and the wife joined in doing acts injurious to the rights of the husband. From the facts stated in the complaint, the defendants were just as responsible as if they had forced her to take the drug, for they had their part in forming the habit in her, and continued the sale of it to her after she had no power to control herself and resist the thirst; and that, too, after the repeated warnings and protests of the husband. There is no difference between the principle involved in this action and the principle upon which a husband can recover from a third person damages for assault and battery upon his wife."

There seems to be but one other case upon this subject: *Heard v. Peck*, 56 Barb. (N. Y.) 202, 1867; but that agrees thoroughly with this.

According to a late decision of the court of Appeals of New York, an injunction will lie at the suit of one claiming an interest in an estate by virtue of an agreement with certain of the heirs-at-law, and also with a devisee under the will, to restrain distribution under a foreign probate decree alleged to have been procured by some of the defendants by virtue of a fraudulent conspiracy, if part of the defendants appear, and is not shown that the other defendants have not been, or may not be, properly served with process, though the bulk of the property involved is in the state where the decree was rendered: *Davis v. Cornue*, 45 N. E. Rep. 449, reversing 37 N. Y. Suppl. 788. Bartlett, Gray and Haight, JJ., dissented.

A claim against a casualty insurance company for disbursement for surgical aid to a person injured, and for the defense of an action by the person for the injuries, is governed by the same limitation as is prescribed by the policy for the losses arising under the policy, if no independent contract by the insurer to pay such claim is shown: *People v. American Steam-Boiler Ins. Co.*,

Injunction,
Restraining
Distribution
of Estate,
Jurisdiction
over Foreign
Property

Insurance,
Casualty,
Limitation

(Supreme Court of New York, Appellate Division, First Department,) 41 N. Y. Suppl. 631.

It has been held by Judge Wheeler, in the Circuit Court for the Southern District of New York, that a combination of railroad companies into a joint traffic association, under articles of agreement by which each road carries the freight it may get over its own line, at its own rates, and has the earnings to itself, though providing proportional rates, or proportional division of traffic, is not a pooling of traffic on freights, or division of net proceeds of earnings, within the prohibition of the interstate commerce law, or of the Act of 1890, (26 Statutes at Large, 209), against unlawful restraints and monopolies; and that the United States cannot maintain a bill in equity to restrain an association of railroads from carrying into effect an agreement alleged to be illegal under the interstate commerce law, when it appears it did not grant the charter of any of the roads, and has no proprietary interest in them. Its right in such a case is to prosecute for breaches of the law, not to provide remedies: *United States v. Joint Traffic Assn.*, 76 Fed. Rep. 895.

According to a decision of the Court of Appeals of Kentucky, a stockholder in a corporation that owns stock in another is disqualified to sit as a juror in a case in which the latter corporation is defendant: *McLaughlin v. Louisville Electric Light Co.*, 37 S. W. Rep. 851.

The Chief Justice of England has recently laid down some very important principles with regard to the power of a justice of the peace to issue a search-warrant: *Jones v. German*, [1896] 2 Q. B. 418. In this case, the sworn information, upon which application for the warrant was made to the justice, stated that the informant "hath just and reasonable cause to suspect and doth suspect that W. J. has in his possession certain property belonging to the said T. W., (the informant,) and that he has

Interstate
Commerce,
Pooling of
Traffic

Justice of the
Peace,
Search-
Warrant

requested the said W. J. to allow him to search several boxes, which the said W. J. has had packed ready to be taken away, but which he refuses to be looked through." The justice issued the warrant, and it was executed. The plaintiff brought an action of trespass against the justice, alleging that the information was insufficient, and that the warrant was consequently illegal and without jurisdiction. The Chief Justice, who reserved the case for consideration after the jury had found for the plaintiff, held, that a search warrant may be issued on an allegation of reasonable suspicion of larceny; that it is not necessary in such an information to allege that a larceny has in fact been committed, but it is enough to allege a suspicion that a larceny has been committed; that it is not necessary to specify in the information the particular goods for which a search is desired; that the information in question substantially averred that the informant suspected that certain property of his had been stolen; and that it was sufficient to give the justice jurisdiction; and accordingly gave judgment for the defendant.

The Court of Errors and Appeals of New Jersey has lately held, that when a corporation is engaged in publishing a newspaper, and it can be inferred from the evidence that a libelous article published therein has been edited and published by some person employed for that purpose; the corporation will be liable to the person libelled to the same extent that an individual would be who had personally made such a publication. "A corporation engaged in publishing a newspaper obviously must act by selected agents. Its directors or managers cannot formally pass on each publication, or determine what it to be admitted therein. Such determination is necessarily committed to its agents. In making such determination, they are acting within the scope of their employment. The intent with which they publish must be imputed to the corporation which employs them to make the publication of the newspaper. If the intent is malicious, the corporation must be liable therefor, as it is for other tortious acts of its agents, done within the scope of their authority, and

**Libel,
Newspaper,
Corporation**

for the purposes for which the corporation was created and the agents were employed:" *Hoboken Printing & Pub. Co. v. Kahn*, 35 Atl. Rep. 1053.

According to the Court of Appeals of Kansas, (Northern Department, W. D.,) a cause of action against an abstractor of titles for giving a wrong certificate of title accrues at the date of the delivery, and not at the time the negligence is discovered or the damage arises: *Provident Loan Trust Co. v. Walcott*, 47 Pac. Rep. 3.

The Supreme Court of the United States has lately held, that Pub. Stat. Mass. c. 157, §§ 96, 98, invalidating transfers of property made with a view to preferring creditors by any one insolvent or in contemplation of insolvency, when that fact is known to the transferee, does not conflict with Rev. Stat. U. S. § 5137, which grants to a national bank the right to hold such real estate as "shall be mortgaged to it in good faith by way of security for debts previously contracted," and such as "shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings;" and that it does not impair any function of national banks as instrumentalities of the federal government. Such banks are therefore subject to the provisions of the Massachusetts statute: *McClellan v. Chipman*, 17 Sup. Ct. Rep. 85, affirming 159 Mass. 363.

The Chief Justice of England has ruled, in *The Queen v. Jameson*, [1896] 2 Q. B. 425, under § 11 of the Foreign Enlistment Act, 1870, which provides that: "If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue: (1) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall

Limitation,
Accrual of
Cause of
Action

National
Banks,
Security,
Effect of State
Laws

Neutrality
Laws,
Expedition
Against
Friendly State

be guilty of an offence," if there be an unlawful preparation of an expedition by some person within Her Majesty's dominions, that any British subject who assists in such preparation will be guilty of an offence, even though he renders that assistance from a place outside Her Majesty's dominions.

The Court of Appeals of New York has adopted the strict rule, favored by the weight of authority, which holds that a public officer, on the ground of public policy, is liable for public moneys entrusted to him, and lost through the failure of the bank in which he had deposited them, though he was not negligent: *Tillinghast v. Merrill*, 45 N. E. Rep. 375, affirming 28 N. Y. Suppl. 1089.

According to a recent decision of the Supreme Court of Pennsylvania, a contract between railroad companies for interchange of traffic and apportionment of earnings is not so indefinite in its terms that it cannot be enforced, merely because the exact details by which each road shall receive and transport promptly the traffic, and the manner of apportioning the earnings on a mileage basis, cannot be particularized by the court: *Camden Valley R. R. Co. v. Gettysburg & Harrisburg Ry. Co.*, 35 Atl. Rep. 952. This is in accordance with the ruling of the Supreme Court of the United States, in *Union Pac. Ry. Co. v. C., R. I. & P. Ry. Co.*, 163 U. S. 564, 1896.

In *Chicago, Burlington & Quincy R. R. Co. v. Miller*, 76 Fed Rep. 439, the Circuit Court of Appeals for the Eighth Circuit lately ruled, that in an action against a railroad company by one of its employees to recover damages for personal injuries through negligence, a plea that the employee had accepted benefits as a member of a relief association organized by the company, under an agreement that he thereby relinquished his right of action, does not form a valid defence when it fails to show that, if the association was at any time short of funds to meet its obligations to a member, that member could main-

tain an action against the company, or fails to set out the arrangement between the company and its employes with such fullness and certainty that the court may be able to see that the arrangement is fair and reasonable, and not against public policy, nor voidable for want of valuable consideration.

The concurring opinion of Caldwell, Circuit Judge, is worth quoting : " Assuming that contracts of this character are valid, this case is rightly decided on the ground stated in the opinion. But such contracts, in so far as they attempt to release a railroad company from liability for injuries inflicted on its employes through its negligence, are without sufficient consideration, against public policy, and void, and must ultimately be so declared by all courts." This dictum, while not consonant with the weight of authority, seems founded in reason and justice, and will prevail in time. The current of opinion is just now setting the other way. See 34 AM. L. REG. N. S. 231.

The Supreme Court of Appeals of Virginia holds, in accord with the weight of decision, that in the absence of

Rewards, Offer by Municipal Corporation	express authority conferred by charter or by general law, a municipal corporation has no power to offer and pay a reward for the arrest and conviction of persons who violate the criminal laws of the state; that such authority cannot be inferred from the " general welfare " clause of a charter, the matter being properly a subject of state and not of municipal jurisdiction; and that the offer by a city council of a reward which it has no authority to pay is <i>ultra vires</i> , and creates no obligation enforceable against the city: <i>City of Winchester v. Redmond</i> , 25 S. E. Rep. 1001.
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At last the use of the journals of the legislature has been acknowledged. In *State v. Wendler*, (Supreme Court of Wisconsin,) 68 N. W. Rep. 759, it appeared that in the laws of 1895, there were printed two statutes numbered 221 one on page 367, the other on page 397. The first was held invalid, because it differed materially from the engrossed bill. The second was

Statutes,
Enactment,
Approval,
Journals of
Legislature

also held invalid, after a careful investigation into its legislative history, because (1) the record did not show that the legislature ever passed it, and (2) because the governor never approved the bill which the legislature attempted to pass, the statute as approved and printed containing amendments which had been stricken out by a conference committee of the two houses.

If this decision is correct, the doctrine of the sacredness of an enrolled and approved bill is nugatory; if that doctrine is valid, this decision is wrong. But it needs no microscope to discover on which side justice lies, when the eyes are freed from the dust of legal quibbling.

The Supreme Court of North Carolina also, has recently backed water very strongly in regard to the sacredness of an enrolled bill. It now holds that when a state constitution requires, in the enactment of certain laws, that the yeas and nays shall be entered on the journals, those journals are conclusive, not only as against a printed copy of the statutes published by authority of law, but as against a duly enrolled act: *Union Bk. of Richmond v. Commissioners of Town of Oxford*, 25 S. E. Rep. 966.

This is a very important recession from the position apparently taken in *Carr v. Coke*, 116 N. C. 223, 1895, which provoked a good deal of discussion about a year ago. The court seems to feel that such is the case; for it takes great pains to point out the distinction between the two cases, and carefully limits the effect of that decision. "This case has no analogy to *Carr v. Coke*, 116 N. C. 223, 22 S. E. 16. That merely holds that when an act is certified to by the speakers as having been ratified, it is conclusive of the fact that it was read three several times in each house, and ratified: Const. art. 12, § 23, and so it is here; the certificate of the speakers is conclusive that this act passed three several readings in each house, and was ratified. The certificate goes no further. It does not certify that this act was read three several days in each house, and that the yeas and nays were entered in the journals. The journals were in evidence, and showed affirmatively to the contrary." This opinion was delivered by one

Statutes,
Enactment,
Legislative
Journals,
Effect

of the judges who dissented in *Carr v. Coke*, and may therefore be taken as authoritative as to the extent of that decision. We are glad to know what it does mean; for the language used was broad enough to cover anything—as broad as charity.

The Supreme Court of Indiana, following *Boring v. State*, Amendment of Repealed Statute 141 Ind. 640, 1895, holds that a statute which purports to amend a repealed statute is *pro tanto* unconstitutional; but that if the rest of the act can stand alone, it will be valid: *Smith v. McClain*, 45 N. E. Rep. 41.

The doctrine that the amendment of an act already repealed by a prior amendment is a nullity, on the grounds (1) that it is a nullity, as an attempt to amend that which has no existence, and (2) that if it be attempted to uphold it as an amendment of the amendatory act, it does not comply with the constitutional provision that an amendment shall refer to the original act by its title, seems to be peculiar to Indiana, where it has been persistently adhered to: *Draper v. Falley*, 33 Ind. 465, 1870; *Board v. Markle*, 46 Ind. 96, 1874; *Blakemore v. Dolan*, 50 Ind. 194, 1875; *Ford v. Booker*, 53 Ind. 395, 1876; *Cowley v. Rushville*, 60 Ind. 327, 1878; *Ni-black v. Goodman*, 67 Ind. 174, 1879; *Brocaw v. Board*, 73 Ind. 543, 1881; *Lawson v. Deblois*, 78 Ind. 563, 1881; *McIntyre v. Marine*, 93 Ind. 193, 1883; *Feibleman v. State*, 98 Ind. 516, 1884; *Boring v. State*, 141 Ind. 640, 1895; *Stony Creek Twp. v. Kabel*, (Ind.) 43 N. E. Rep. 559, 1896. This view wholly disregards the obvious reply that the amendment may stand as an independent enactment, at all events, the purpose to amend being rejected as surplusage, and that the reference to the title of the original act sufficiently indicates a purpose to amend that which takes its place, the date being mere surplusage; accordingly, most other courts have taken a common sense view of the situation, holding that the evident intention of the legislature is to amend the amendatory statute; and therefore that the date of the act as stated should be rejected as surplusage: *State v. Warford*, 84 Ala. 15, 1887; *Harper v. State*, (Ala.) 19 So. Rep. 857, 1896; *Bassett v. Jacksonville*, 19 Fla. 664, 1883; *Comm. v. Kenneson*,

143 Mass. 418, 1887; *People v. Upson*, 79 Hun, (N. Y.) 87, 1894; or that an amendment does not repeal the amended act so as to preclude its re-amendment: *Fletcher v. Prather*, 102 Cal. 413, 1894; *State v. Brewster*, 39 Ohio St. 653, 1884. Of course, in such a case the prior amendment is repealed by the latter: *Wilkinson v. Kettler*, 59 Ala. 306, 1877; *Blake v. Brackett*, 47 Me. 28, 1859; *Kamerick v. Castleman*, 21 Mo. App. 587, 1886. An express repeal of the original statute repeals the amendment: *Greer v. State*, 22 Tex. 588, 1858.

The Supreme Court of New York, (Appellate Division, Second Department,) has very wisely decided, that the penalty for refusal to give a transfer to "any passenger desiring to make one continuous trip" between any two points on a street railroad system, imposed by the Laws of New York of 1892, c. 676, § 104, cannot be recovered by one who demanded a transfer with the sole object of recovering for refusal: *Meyers v. Brooklyn Heights R. R. Co.*, 41 N. Y. Suppl. 798.

A joint action will not lie against the separate owners of dogs which unite in destroying the property of a third person.

Each person is liable only for the damage done by his own dog, and not for that which is done by the dogs which do not belong to him. This rule applies to all cases of trespass by animals. "The reason which makes one who personally aids in or about the wrong done by another liable for the whole amount of the injury done, does not apply in a case like that under consideration. In the case of a joint tort, each offender's liability arises out of the fact that his participation in the wrongful act was voluntary and intentional; and the law, as a punishment for his wrongdoing, as well as for the protection of the rights of the injured party, makes him answerable for all the consequences of that act. But, in the case of animals which wander off and unite in perpetrating mischief, there is no actual culpability on the part of their owners. Liability in such a case only exists by reason

Street
Railroads,
Transfer,
Refusal,
Penalty

Torts,
Jointer of
Actions

of the negligence of the owners in permitting their animals to stray away and commit the depredations, and it has therefore always been held, when the question has come before the courts, that joint action will not lie against separate owners of dogs which unite in committing mischief: " *State v. Wood*, (Supreme Court of New Jersey,) 35 Atl. Rep. 654; citing *Denny v. Correll*, 9 Ind. 72, 1857; *Buddington v. Shearer*, 20 Pick. (Mass.) 477, 1838; *Van Steenburgh v. Tobias*, 17 Wend. (N. Y.) 562, 1837; *Auchmuty v. Ham*, 1 Denio, (N. Y.) 495, 1845; *Partenheimer v. Van Order*, 20 Barb. (N. Y.) 479, 1855; *Adams v. Hall*, 2 Vt. 9, 1829.

The beneficiary in a life insurance policy procured with stolen moneys is not an innocent third person as against the person from whom the moneys were stolen, but takes the policy subject to the means by which it was procured; and when the premiums on a policy are paid with stolen moneys, and the amount of the thefts equal the amount of the policy, the person from whom the moneys were stolen is entitled to the proceeds of the policy: *Dayton v. H. B. Claflin Co.*, (Supreme Court, Trial Term, New York County,) 41 N. Y. Suppl. 839.

When a loan, payable in monthly instalments, including interest due at the time of payment, is made at the highest legal rate of interest, and notes are given for each instalment, including the interest due at the maturity of each note, the fact that the notes provide for interest after maturity in case of default does not render the loan usurious, since, if the notes are paid at maturity, the contract is legal, and therefore the default of the borrower will not make it illegal: *Crider v. San Antonio Real Estate, Bdg. & Loan Assn.*, (Court of Civil Appeals of Texas,) 37 S. W. Rep. 237.

In a proceeding in equity to remedy a mistake made by the

foreman of the jury in announcing the verdict, the jurors are competent witnesses to prove that the verdict as read out by the foreman was not their verdict, but the result of an oversight on his part: *Hamburg-Bremen Fire Ins. Co. v. Pelser Mfg. Co.*, (Circuit Court of Appeals, Fourth Circuit,) 76 Fed. Rep. 479.

Verdict,
Evidence of
Jurors

Will,
Contract not
to make,
Statute of
Frauds,
Part
Performance

According to a recent decision of the Supreme Court of Illinois, a parol contract to make no will that will deprive one of property which she would take as heir if there was no will, having relation to real estate and personalty and being within the statute of frauds as to the former, is indivisible, and therefore wholly void; and the legal adoption by a grandmother of her deceased son's only daughter, as her own child, is not such a part performance as will take such a contract out of the statute: *Dicken v. McKinlay*, 45 N. E. Rep. 134.

Disinherit-
ance,
Void Trusts,
Right of
Child

In another case before the same court, *Lawrence v. Smith* 45 N. E. Rep. 259, a testator had bequeathed the bulk of his estate upon trusts which were declared void as violating the rule against perpetuities. By a clause in the will he disinherited one of his children; but it was held that that disinheritance could not affect the right of the child to share in that portion of the estate as to which, by reason of the invalidity of the trust, the testator died intestate.

Witness,
Competency,
Physician and
Patient,
Privileged
Communication,
Rational Hospital

The Court of Appeals of Colorado has lately held that when a corporation maintains a hospital for the treatment of its employees, which is supported, either in whole or in part, by contributions reserved from the wages of the employees, the relation of physician and patient exists between the surgeon in charge of the hospital and an employee, who is treated by him for an injury; and the surgeon is therefore not competent to testify, except with the consent of the

patient, as to any information regarding the injury acquired by reason of his attendance on the patient: *Colorado Fuel & Iron Co. v. Cummings*, 46 Pac. Rep. 875.

Ardemus Stewart.

THE AMERICAN LAW REGISTER AND REVIEW

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CIVIL JUDICIAL STATISTICS. The recent publication for Parliament of Part II. of the Judicial Statistics for England and Wales for 1894, entitled Civil and Judicial Statistics, contains many valuable facts as to the amount of litigation in England for the past thirty years. A careful introduction by Dr. Macdonnell reviews the subject-matter contained in the subjoined tables and diagrams. Though he shows that, in proportion to the population, more business is done by the Appellate Courts in England than by the Supreme Court of the United States, he does not furnish us with any statistics as to our state courts, and therefore we have no means of determining the relative litigious propensities of the two nations.

It would be presumptuous in a foreigner to attempt to draw conclusions from these statistics, without an understanding of English judicial conditions, but there are several facts we may note with interest.

In proportion to the population, Dr. Macdonnell shows that litigation in England is slowly, but steadily, decreasing, this fact being

attributable in some measure to the growth of arbitration. The number of appeals, however, has greatly increased, and the general drift of business has been away from the Queen's Bench Division to the County courts. Dr. Macdonnell estimates the plaintiff's chances of recovery as three to one, and in criminal cases the Crown's chances as four to one, in view of which facts it seems very creditable to the honesty of the English people that litigation is steadily on the decline.

The business of the divorce courts has perceptibly increased since 1858; but the most striking fact is, the marked decrease in all courts of the number of jury trials. In the past sixteen years in the Queen's Bench Division, they have decreased from ninety-two to forty-seven per cent. of the cases decided.

Finally, we may note as a mark of the advance of civilization, that crimes of violence are steadily diminishing, and that in their place people are seeking redress by litigation, as evidenced by the contemporaneous increase of suits for personal torts. If litigation is supplanting crime, and amicable arbitration between nations and between individuals is to supplant contentious litigation and internecine war, are we not really making steady progress toward a Utopian society?

FORGED ENDORSEMENTS. A decision by the Court of Appeals of Indian Territory, *Green v. Purcell Nat. Bank*, 37 S. W. 50 (1896), deserves commendation on account of the clear reasoning of the court, and should be specially noticed in view of Mr. Justice Matthew's recent opinion, *London, etc., Bank v. Bank of Liverpool*, 12 B. D. 7 (1896), reaching a contrary conclusion through a misapplication of prior decisions. The Purcell Bank received a check from Green for collection. The drawee bank in New York honored the check, and Green was paid. The payee's name having been forged, the Purcell Bank repaid the drawee bank the amount of the check, without notifying Green of the forgery. About three months later, the bank received another check from Green, collected it and accredited the proceeds to the amount previously paid Green on the forged check. Green thereupon sued for the amount.

The court refused a recovery on the ground that Green had no title to the forged check, hence could claim nothing under it. "In law he was charged with the knowledge of the forgery, the beneficiary of which he became by his own acts. He stood in the forger's shoes, and, however innocent, he may have been in fact, yet in law having received the stolen goods, he acquired no better title than the thief himself would have had."

In the English case plaintiff bank was drawee of a bill; the payee's name was forged, but through ignorance of this fact, the plaintiff paid the bill to defendant. Some months afterward the forgery was discovered, and this suit brought. Mr. Justice Mathew

refused a recovery upon the ground that "when a bill becomes due and is presented for payment the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered at once, it may be the money can be recovered back; but if it be not, and the money is paid in good faith, and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back." This principle is deduced from cases like *Cocks v. Musterman*, 9 B. & C. 902, and *Price v. Neal*, 3 Burr. 1355, where a forged drawing, instead of a forged endorsement, was before the court.

With deference, it is suggested that this principle is entirely inapplicable to a case where a defendant desires to hold funds obtained upon an instrument to which he had no title. However, it may be justified by commercial necessity in cases where, owing to a forged drawing, no contract existed.

As long ago as 1841 the Supreme Court of New York, per Mr. Justice Cowen, permitted a recovery in *Canal Bank v. Bank of Albany*, 1 Hill, 287, a case not distinguishable, in fact, from the English case.

The principle of the Indian Territory court has been recognized in Pennsylvania: *Chambers v. Union Bank*, 78 Pa. 205 (1875). See also Keener on Quasi Contracts, 154, note.

RAILWAYS; NEGLIGENCE; DUTY TO TRESPASSERS. The dissent of Magruder, C. J., in the late case of *Wabash R. R. Co. v. Jones*, (45 N. E. 50) Supreme Court of Illinois, while taken on a point of pleading, marks an attempt to escape the consequences of the Illinois rule on the subject of duty to trespassers on railroads.

The material facts were that a child was injured, while walking on the track, in a manner and for a purpose pursued by many of the community and sanctioned by a usage of twenty-five years. The railroad company sought to escape liability for its servant's alleged want of care, on the ground that plaintiff was a trespasser. To this view the majority of the court inclined.

The jurisdictions adopting the Illinois view hold that the railroad never has any duty toward persons found on its tracks other than the duty to avoid wilful injury, unless those persons have been positively invited by the railroad company to go upon its tracks. They draw a sharp "distinction between cases where there is a mere naked license or permission to enter upon or pass over an estate and cases where the owner or occupant holds out any enticement, allurement or inducement to persons to enter upon or pass over his property:" *Ry. v. Bodemer*, 139 Ills. 596 (1892). The view which is found in the majority of American jurisdictions is clearly expressed by Boggs, P. J., in the decision of this same case in the appellate court: 123 Ills. 125 (1893). "We do not think that this evidence was admitted for the purpose, as is supposed, of

establishing a legal right in the plaintiff to be upon the track ; its admission was proper for another purpose. . . . If the evidence . . . tended to show that persons were likely to be upon the track at the time when and at the place where the appellee was injured, and that the company had notice thereof and had reason to anticipate the presence of persons there, though trespassers, then . . . the evidence was competent."

This theory does not require the railroad constantly to exercise vigilance, in order to ascertain whether the track is free ; the company is not required to anticipate the presence of any unauthorized persons upon its tracks, in the absence of knowledge or notice. "The degree of care required in the operation of trains is proportioned to the danger likely to result therefrom:" *Texas & P. R. Co. v. Watkins*, 26 S. W. 760 (1894).

This is the rule followed in New York, Pennsylvania, Missouri, *Powell v. R. Co.*, 59 Mo. Ap. 626 (1894) ; Wisconsin, *Johanson v. R.*, 86 Wis. 63, 56 N. W. 161 (1893), and most of the western States. The Massachusetts view is somewhat uncertain. In *Chenery v. Fitchburg, etc., R.*, 160 Mass. 211, it was held that the existence of a license by acquiescence to cross at a private way was a question for the jury. The Illinois rule prevails in Alabama and a few other States.

The first case in Illinois laying down the rule now followed in that State was *R. v. Godfrey*, 71 Ills. 500 (1874). This case (which did not go quite the length of the principal case, since the decision was based partly on the contributory negligence of the plaintiff) seems to have been decided largely on the authority of the Pennsylvania cases of *R. v. Hummel*, 44 Pa. 375, and *Gillis v. R.*, 59 Pa. 129. In *R. v. Hummel*, Strong, J., employed what is now generally regarded as a mistaken analogy in the following language :

"There is as perfect a duty to guard against accidental injury to a night intruder into one's bed-chamber as there is to look out for trespassers upon a railroad where the public has no right to be." The Supreme Court of Nebraska, *R. v. Wymore*, 40 Neb. 645, 58 N. W. 1120 (1894), refused to follow this ruling.

This expression of Mr. Justice Strong was, nevertheless, quoted with approval by Sharwood, J., in *Gillis v. R.* (*supra*), and the latter judge on the authority of *R. v. Hummel* (*supra*) dissented in *Kay v. P. R. Co.*, 65 Pa. 269 (1879). It was held, in this case, distinguishing and virtually overruling *R. v. Hummel*, (at least so far as it was made use of in the Illinois cases), that if a railroad company allowed the neighboring population to use its tracks as a way, the presumption of a clear track could not arise as in other parts of the road, and that greater precaution was necessary under these circumstances than elsewhere. To the same effect is *Taylor v. Canal Co.*, 113 Pa. 162 (1886).

The Illinois courts continue to cite *R. v. Hummel* (*supra*) and *Gissel v. R.* (*supra*), as though they embodied the Pennsylvania law on the subject.

The Supreme Court of Washington, in a case almost on all fours with the present one, *Roth v. Union Depot Co.*, 13 Wash. 525 (1896), have gone into a most elaborate and exhaustive survey of the authorities, and have reached a conclusion contrary to that of the Illinois court. It is interesting to observe that Hoyt, C. J., dissents, on the ground that he can see no difference between the duty of a railroad to trespassers, and that of any other land holder.

This analogy is surely a false one. Certainly a railway *does* owe some duty of caution toward persons whose presence on the track *it has* reason to anticipate. Common justice and humanity demand *that* a railroad use a greater degree of care in a crowded country *where* it knows that trespassers are likely to be, than in lonely and unfrequented places. To this demand the great majority of authorities respond, and the Supreme Court of Illinois, when it frees the railroad in such cases from liability for all negligence except such gross want of care as will amount to wilfulness, announces a rule of law which few jurisdictions approve.

INTERFERENCE WITH TRADE MARKS—WHEN INJUNCTION WILL BE GRANTED.

In the case of *Lafau et al. v. Weeks*, Pa. Adv. Rep. 27, Nov. 1896, 177 Pa. 412, complainant filed a bill praying that the defendant be restrained from fraudulently making use of a certain trade mark, which complainant alleges is an infringement upon his own, which is registered and thus described in the Patent Office:

"Our trade mark consists of the letters P. C. W. These letters have generally been arranged as shown in the accompanying fac-simile, in which they appear as script, printed in a horizontal line upon a background of any suitable color; but other forms of letters may be employed, or they may be differently arranged, without materially altering the character of our trade mark, the essential features of which are the letters P. C. W."

Complainant had been engaged for a long number of years in manufacturing candies and his goods had obtained a high reputation, when the defendant entered the business and registered a trade mark consisting of the letters W. H. W., to be printed in script, in white, on a dark ground. It appeared that in both cases the letters were the initials of the founder of the business.

In addition to these facts, the master found that the defendant had been a manufacturer and commission merchant in the candy trade. That in the latter capacity he had handled the plaintiff's goods till within a short time before the bringing of this suit, when he had commenced manufacturing on a larger scale and given up dealings with the plaintiff. That at this time he had ceased to use the markings formerly employed by him upon his boxes, and had adopted in all respects those of the plaintiffs. The latter had printed the letters P. C. W., in script, in white, on a red background, upon a label which was pasted on the boxes. The defendant pasted similar labels with the letters W. H. W. upon

similar boxes. The plaintiff had invented names for different varieties of his goods, which defendant also copied, printing them upon the ends of the boxes in a like style with that in use by plaintiff. The arrangement of the candies was also imitated, as was their size, shape, and color. The defendant, upon being notified that he was infringing the plaintiffs rights and causing deception, refused to change his methods.

From these facts the master drew the following conclusions, viz.: "That the defendant's trade mark and label bear such similarity of appearance to those of the plaintiffs as to be likely to deceive persons of ordinary intelligence, measured by the general standard of the mass of people dealing in and buying such goods and using reasonable care and caution." . . . "That cases of actual deception in this respect have taken place." . . . And "that the design on the part of the defendant in adopting and using the present trade mark and label, and the use of the boxes and packages and names in question was and is to deceive buyers and purchasers of the defendant's goods, and to enable them to sell their manufactures on the strength of the popularity of the goods of the plaintiffs." That though "the initials P. C. W. do not constitute a valid technical trade mark in the sense of preventing their use by defendants, *without intent to deceive*, of the initial letters W. H. W., which is the form adopted, and which, in connection with the similar style of the packages, names, and label, bear a close resemblance to the initials P. C. W.—yet that under the facts of this case, as hereinbefore found, the defendants have no legal right to the use of the initials W. H. W. in the form and upon the style of label adopted by them, and that such use constitutes a fraud upon the plaintiffs, against which they are entitled to relief." And the master therefore recommended that an injunction be granted restraining the defendant from printing the initials W. H. W. in script, in white, in a horizontal line, upon a red background, which injunction the court issued.

On review by the Supreme Court, it was held that the decree had gone beyond the plaintiff's claim. That the defendant had a right to use his own initials, and that the plaintiff could not claim an exclusive right to the use of any particular lines, colors, or methods of packing his goods, as such things are in their nature common to all men. That it was, therefore, apparent that plaintiff had no valid trade mark, and his only complaint being that his trade mark had been infringed, his claim was fully answered, and the lower court erred in giving relief in such a case. "If," said the court, "the defendants are really attempting to sell their own confectionery by representing it to the public as the production of the plaintiff, this, and not an infringement of the trade mark, should be charged in the bill as the ground of relief."

From this decision three judges dissented, Mitchell J. delivering the opinion and basing it upon the short ground that this was a clear case of fraudulent intent on the part of the defendant to

represent his own goods as those of the plaintiff and that equity should, and usually did, grant relief without reference to the strict doctrine of trade marks.

The general rule seems to be well settled that the letters of the alphabet are common property, and cannot be exclusively appropriated by any one so as to prevent their use in a usual and legitimate way by others: and that one may use his own name, though it be identical with that of another engaged in the same line of business, and though such use does, in fact, inflict loss upon that other, *SUBBET*, NEVERTHELESS, in both instances, to the qualification that neither the letters nor the name are so used as to practice a fraud upon the rival manufacturer or to deceive the public. Their use must be strictly confined to the purpose of indicating the origin, character, quality or ownership of the goods, and the weight of authority seems to require that one shall exercise great caution to prevent injury to him who has first used the name and established its reputation. In such cases the intent to deceive became the criterion, and this being present, the courts will enjoin the use of the name.

In this case the plaintiff has declared for an infringement of his trade mark, and under this has proved that defendant is fraudulently selling his goods as those of the plaintiff, to the deception of the public, and his, the plaintiff's, injury. The answer of the court is, that plaintiff has not the exclusive right to the trade mark, which he has alleged. Now it would seem that as between two persons having the same name, *that* one who has established its reputation in the business *has* a *prima facie* right to its exclusive use as a trade mark. The later comer may indeed show that he also has the right, but his claim is refuted by proof of his bad faith. It is too well settled to require the citation of authority, that where such bad faith in the use of one's name is shown he may be restrained, but the question raised by this decision is, as to whether the injunction will be granted on the ground of infringement of trade mark, or whether the bill must be based on the injury which is being wrought by the defendant's deceit; and the court have taken the latter view.

Since the *raison d'être* of trade marks is so to characterize one man's goods, that they shall not be mistaken for those of another, and to prevent the fraudulent representation by the latter that his goods are those of the former, it would seem that when a plaintiff has shown that the very wrong has occurred to prevent which trade marks were created and protected by the courts, that it is a somewhat technical rule, and, (as suggested by Mr. Justice Mitchell), one not supported by authority, which decides that recovery cannot be had because the bill charges an interference with the trade mark, and not an interference with the right which the complainant has sought to protect by the use of the trade mark.

The master found that the defendant had and was perpetrating a fraud upon the plaintiff, who thereupon was entitled to relief, and

granting that what plaintiff called his trade mark was not valid in all particulars, it at least sufficed to indicate the nature of the right claimed and the scope of the wrong which was being done; and the spirit of the complaint thus being shown, it would not have been without the equitable jurisdiction of the court to do justice between the parties.

BOOK REVIEWS.

AMERICAN AND ENGLISH DECISIONS ON EQUITY. With Notes referring to the Principal Matters. Annoted by ARDENUS STEWART. First Series, Volumes II. Philadelphia: M. Murphy. 1896.

This is the first volume of this series edited by Mr. Stewart, and he has performed his work in a very creditable manner. The cases are selected with discrimination, and edited with care. The notes are full, and add to the practical utility of the volume. Among the matters treated of is the question as to whether the right of privacy dies with the person, raised by the New York case of *Schuyler v. Curtis*. There is an excellent note to *Id. re Debs*, reported also in a former volume, which, together with the valuable notes to other cases reported, makes the volume on the whole worthy of distinct commendation.

R. R. F.

A TREATISE ON THE LAW OF CIRCUMSTANTIAL EVIDENCE. By ARTHUR P. WILL, of the Chicago Bar. Philadelphia: T. & J. W. Johnson & Co. 1896.

This work is a departure from the usual course of book-making in that it deals with circumstantial evidence alone and that it is essentially a case treatment. The earlier pages of the volume are devoted to general statements in respect to evidence; this part though more or less comprehensive, is briefly put.

The subject proper is one which is perhaps insufficient in scope to warrant a work to itself; yet since the attempt has been made, we might wish that that it had been done in a different manner. The chapters consist of extracts taken from opinions in cases, perhaps between three and four thousand in number. These statements are what may be called isolated paragraphs, rarely lengthy, and seldom exhaustive. The volume contains neither a general treatment of the subject of circumstantial evidence nor a comprehensive collection of cases. Therefore it can scarcely be considered a standard work.

On the other hand it has features which are valuable and which make it an interesting and instructive book to be read. Besides the general introductions to the chapters and the subsequent case extracts, there are analyses of about a dozen cases illustrative of criminal poisoning and force of circumstantial evidence. After a reading of the volume one feels that the occupation has been pleasant and profitable, yet the judgment will more than probably be passed that the work is not an authority.

It is noticed that on page 221 the statement is set out that a

comparison of the handwriting of a disputed document with handwriting admitted to be genuine may not be made in Pennsylvania by experts.

This rule of law was superseded nearly two years since by a statute allowing such comparison [P. L. 1895, page 69], which enactment should have been noted both for purpose of practice and to show the tendency of legislation on the subject.

D. P. H.

THE LAW OF EVIDENCE. By BURR W. JONES, of the Wisconsin Bar. San Francisco: Bancroft-Whitney Company. 1896.

"My primary object," writes the author in the preface, "has been to furnish a convenient text-book for tried lawyers, stating tersely the rules of law which govern in the trial of civil cases." Viewed from this standpoint the work which Mr. Jones has brought to the profession is a valuable one. A busy lawyer can reach, by means of a most complete index, the law of evidence clearly stated, the latest authorities, and many references to the annotated cases and articles in the legal reviews. Moreover, the ground prescribed is fully and ably covered, although it is to be observed that if the scope of the book is, as the author says, "the rules of law which govern in the trial of civil cases" only, a discussion of Dying Declarations, the Right to Inspection of the Person and of Articles in Criminal Cases, and the Rights of Accused Persons to Refuse to Testify, is out of place. Having, however, enlarged the scope of the book to admit of a consideration of these subjects one would expect to find a statement of the law relating to Confessions, which title is dismissed by Mr. Jones as "belonging more properly to the criminal law."

The arrangement of the book is, in some respects, unfortunate. The underlying principle of the whole field of the law of evidence is that of relevancy, a discussion of which is postponed until after the subjects, "Presumptions" and "Judicial Notice," have been disposed of. When the subject of "Relevancy" is treated, we do not find the "Res Gestæ Rule" until five chapters, to wit: "Burden of Proof," "Best Evidence," "Substance of the Issue," "Admissions" and "Hearsay" have intervened in the order named.

The title "Presumptions" has been accorded special emphasis by the author. In the two hundred pages which it covers, it would seem that the applications of the general rules have been almost unnecessarily multiplied. In some instances, the illustrations would more naturally fall under a discussion of the law relating to the burden of proof. An example of this is seen by reference to paragraph 54.

The Chapter on "Real Evidence" is especially interesting, covering as it does a field which is entirely overlooked by Stephen and some of the other writers. The Parol Evidence Rule is likewise

well treated, and a chapter on "Depositions" is of much practical value.

The work contains in all some two thousand pages; the typography is excellent, and the method pursued of grouping the citations at the end of each paragraph is less confusing than numerous foot-notes. The volumes, three in number, are small in size, possibly too small, as their number renders a "pocket edition" out of the question.

T. S. Gates.

BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked * will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.]

TREATISES.

COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, HISTORICAL AND JURIDICAL. By ROGER FOSTER. Three Volumes. Vol. I. Boston: The Boston Book Co. 1895.

AMERICAN RAILROAD AND CORPORATION REPORTS. Edited by JOHN LEWIS. Vol. XII. Chicago: E. B. Myers & Co. 1896.

THE ELEMENTS OF JURISPRUDENCE. By THOMAS ERSKINE HOLLAND, D.C.L. Eighth Edition. Revised. New York: The MacMillan Co. 1896.

MORTUARY LAW. By SIDNEY PERLEY, of the Massachusetts Bar. Boston: Published by George B. Reed. 1896.

A TREATISE ON MECHANICS' LIENS. By LOUIS BOISOT, JR., A.B., LL.B., of the Chicago Bar. St. Paul: West Publishing Co. 1897.

COMMENTARIES ON THE LAWS OF ENGLAND. IN FOUR BOOKS. By SIR WILLIAM BLACKSTONE, Knight, one of the Justices of His Majesty's Court of Common Pleas; with notes selected from the editions of Archibald, Christian, Coleridge, Chitty, Stewart, Kent and others; and in addition, notes and references to all text books and decisions wherein the commentaries have been cited, and all statutes modifying the text. By WILLIAM DRAPER LEWIS, Ph.D., Dean of the Department of Law of the University of Pennsylvania. Book I. Philadelphia: Rees, Welsh & Co. 1897.

A TREATISE ON THE LAW OF FIRE INSURANCE. By D. OSTRANDER. Second Edition; revised and enlarged. St. Paul, Minn.: West Publishing Co. 1897.

A PRACTICAL TREATISE ON THE LAW OF RECEIVERS, with extended consideration of Receivers of Corporations. By CHARLES FINE BRACH, Jr., of the New York Bar. Second Edition, with elaborate additions, etc. By WILLIAM A. ALDERSON, of the St. Louis Bar. New York: Baker, Voorhis & Co. 1897.

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No. 3.

INCIDENTS OF IRREGULAR INCORPORATION.

SECOND PAPER.

In the former paper an attempt was made to state the problems which grow out of irregularities in the organization of corporations and joint-stock companies. The various solutions worked out by the courts were set forth and some emphasis was laid upon the tendency (in the case of alleged corporations as distinguished from joint-stock companies) to confine a plaintiff in his recovery to the corporate fund instead of permitting him to recover against the associates as partners. Another phase of the same tendency was thought to be discernible in that class of cases in which, where the corporation is suing as a plaintiff, the courts preclude the defendant from taking refuge behind an irregularity in the plaintiff's corporate organization. It was suggested that if these results could be asserted without qualification, the law would have gained much—at least as far as simplicity of statement is concerned. It was observed, however, that suits by or against associates claiming to be incorporated are still likely to be complicated by a consideration of the degrees of compliance or non-compliance with statutory prescriptions and by a discussion of the amount of *user* necessary for the conception of a *de facto* corporation. The justification for the retention of these com-

plicating elements was found in the prevalent belief that the courts must in this way discourage the usurpation of corporate franchises by unauthorized individuals and discountenance the attempt to obtain the benefits of limited liability without a corresponding willingness to bear its burdens. While recognizing the paramount importance of regularity in corporate organization and the great dangers attendant upon the usurpation of corporate power, it was suggested that the true way in which to reach the desired result is to develop the machinery for checking and punishing irregularity and usurpation in proceedings instituted by the state for that purpose, as distinguished from the introduction into private litigation of a consideration of the relations between the corporation and the state. In the pages that follow it is proposed briefly to develop the thought which lies at the basis of this suggestion.

The suggested theory is this : Where associates hold themselves out as a corporation and engage in business as such, they shall be treated as a corporation in all private litigation between themselves and those who make contracts with them in the course of the business in which they are engaged. If the associates sue as a corporation upon such a contract, the defendant cannot set up the irregularity of the plaintiff's corporate organization as a defence. If they are sued as partners, they may defend on the ground that the plaintiff contracted with them when they were doing business as a corporation. If the contract is made pending an unexecuted intention to organize as a corporation, the associates are of course liable as individuals. If, however, the contract is made after the associates have assumed to organize as a corporation, there is no individual liability at law, even if the plaintiff did not in fact know of the organization. Not only, however, is a doing of business without compliance with the statute to be made punishable at the instance of the state, but wherever the assertion of a corporate organization amounts to a fraud upon creditors, relief may be had in equity by the aggrieved creditor against all those who used the corporate organization as a means of fraud.

The basis of the suggested theory is not in any sense

estopped. The right of an irregular corporation to recover in contract cannot be worked out upon the theory that the defendant is *estopped* from denying the corporate existence any more than it can be said with accuracy that a creditor-plaintiff is *estopped* from treating the members of an irregular corporation as partners. It is difficult to find the elements of estoppel in these cases. The basis of the theory is *contract*. The individual and the associates acting as a corporation have given to the entity a legal existence at least for the purposes of the contract which they have made; and it may be said of the individual that he either has a corporate contract or he has no contract at all. If the organization is inchoate: that is to say, if the associates themselves recognize that some steps are yet to be taken before they can attain corporate existence, it should seem to be a logical conclusion that no corporate contract can exist. Neither party, by supposition, intends to make a corporate contract. If, however, the contract is made after the associates have begun to do business as a corporation, then a contract entered into in the course of business must be treated as a corporate contract, for there is no intention upon their part to limit themselves individually. It is of the essence of the suggested theory, however, that the adoption of a corporate form of organization should be susceptible of treatment by a court of equity as being itself a fraud upon creditors, in cases in which the usual *indicia* of fraud are present and the creditors have in fact suffered damage. If a corporation is organized without paying into its treasury in cash the percentage of capital required by the act, the fact of non-compliance with the statutory provision will be of itself a ground for the withdrawal by the state of the corporate privilege which the associates have abused. As between the corporation and an individual, however, the non-payment of the required percentage will in no sense give to the individual a right to treat the contract which he has made as being other than a corporate contract. If he can show that the associates have acted in bad faith and that he has actually been prejudiced by their conduct, he can have recourse to an unlimited liability in equity by treating the corporate organization as a mere device put

forward to hinder and delay creditors. In other words, he will be in all cases confined to his contract rights unless the facts are such that he can show himself entitled to file a bill to obtain some recognized form of equitable relief. There will no longer be room for a discussion in private litigation of the extent of compliance or non-compliance with statutory requirements. There will no longer be a place for a consideration in private litigation of what does and what does not amount to *user* of corporate privileges. The only question for consideration will be the question whether the associates have or have not in good faith assumed to act as a corporation. If they have, no liability can be enforced except liability upon the corporate contract. If, on the other hand, what they have done has not been done in good faith, an injured plaintiff has all the rights which belong in equity to victims of a fraud upon creditors.

If instead of a case of irregular organization it appears that the associates have regularly organized but have in reality used the corporation law as a device to enable a sole trader to obtain limited liability, it is sufficiently obvious that the suggested theory places no obstacle in the way of a solution of the problem. The theory deals with the relations between an individual and a corporation where the corporation is so irregularly organized that the state may proceed against the associates if it sees fit to do so. In the case now put, however, the state has by supposition no rights against the associates because the associates have complied with the requirements of the law. If the associates have satisfied the conditions imposed by the state, *a fortiori* they are exempt from attack at the suit of private individuals. This seems to be the true explanation of the case of *Broderip v. Salomon* (*Salomon v. Salomon & Co. Limited and Cross Appeal*)¹ recently decided by the House of Lords. Readers of the former paper will recollect that the decision of the Court of Appeal in this case was commended by the *New York Times*, while the decision of the House of

¹ 75 *Law Times*, 426, (1897). The decision in the Court of Appeal (which was reversed by the House of Lords) is reported in 72 *L. T. Rep.* 755, and in 2 *Ch. Div.* (1895) 323. The Court of Appeal had affirmed an order of Williams, J. reported in 72 *L. T. Rep.* 261.

Lords was criticised as conferring upon traders an "unlimited authority to cheat."¹ It is submitted, however, that there is no escape from the conclusion that the decision of the House of Lords was correct. The facts of the case are thus stated by Lord Herschell at page 432: "By an order of the High Court, which was affirmed by the Court of Appeal, it was declared that the respondent company, or the liquidator of that company, was entitled to be indemnified by the appellant against the sum of £7733 8s. 3d. and it was ordered that the respondent company should recover that sum against the appellant. On the 28th July 1892 the respondent company was incorporated with a capital of £40,000, divided into 40,000 shares of £1 each. One of the objects for which the company was incorporated was to carry out an agreement, with such modifications therein as might be agreed to, of the 20th July, 1892, which had been entered into between the appellant and a trustee for a company intended to be formed for the acquisition by the company of the business then carried on by the appellant. The company was in fact formed for the purpose of taking over the appellant's business of leather merchant and boot manufacturer, which he had carried on for many years. The business had been a prosperous one, and, as the learned judge who tried the action found, was solvent at the time when the company was incorporated. The memorandum of association of the company was subscribed by the appellant his wife and daughter, and his four sons, each subscribing for one share. The appellant afterwards had 20,000 shares allotted to him. For these he paid £1 per share out of the purchase money which, by agreement, he was to receive for the transfer of his business to the company. The company afterwards became insolvent and went into liquidation. In an action brought by a debenture-holder on behalf of himself and all the other debenture-holders, including the appellant, the respondent company set up by way of counter-claim that the company was formed by Aaron Salomon, and the debentures were issued in order that he might carry on the said business and take all the profits without risk to himself, that

¹ 36 *American Law Register and Review* (N. S.) p. 19.

the company was the mere nominee and agent of Aaron Salomon, and that the company or the liquidator thereof was entitled to be indemnified by Aaron Salomon against all the debts owing by the company to creditors other than Aaron Salomon. This counter-claim was not in the pleading as originally delivered: it was inserted by way of amendment at the suggestion of Williams, J., before whom the action came on for trial. The learned judge thought the liquidator entitled to the relief asked for and made the order complained of. He was of opinion that the company was only an alias for Salomon: that the intention being that he should take the profits without running the risk of the debts, the company was merely an agent for him, having incurred liabilities at his instance, was, like any other agent under such circumstances, entitled to be indemnified by him against them. On appeal the judgment of Williams, J., was affirmed by the Court of Appeal, that court 'being of opinion that the formation of the company, the agreement of Aug. 1892, and the issue of debentures to Aaron Salomon pursuant to such agreement were a mere scheme to enable him to carry on business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act 1862, and further, to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures.' The learned judges in the Court of Appeal dissented from the view taken by Williams, J., that the company was to be regarded as the agent of the appellant. They considered the relation between them to be that of trustee and *cestui que trust*, but this difference of view, of course, did not affect the conclusion that the right to the indemnity claimed had been established. It is to be observed that both courts treated the company as a legal entity distinct from Salomon and the then members who composed it, and therefore as a validly constituted corporation. This is, indeed, necessarily involved in the judgment which declared that the company was entitled to certain rights as against Salomon." Now either the organization formed by Salomon and the members of his family was or was not a corpora-

tion as between themselves and the sovereign. If the court had decided that it was not a corporation, then the questions heretofore discussed would have demanded consideration—how far, namely, creditors could take advantage of this circumstance in private litigation. But the judges of the Court of Appeal admitted that all things had been done in the matter of organization which the statute required and it seems fair to say that they conceded that a valid corporation had come into being even as against the sovereign. If, then, the organization was a corporation as between itself and the sovereign, certain important consequences followed. In the first place, the title to its property was vested in it and, in point of law, its business was to be regarded as carried on by it. In the second place, its debentures were perfect obligations and enforceable against it unless they could be impeached for fraud. Thirdly, the relation between the corporation and its stockholders was not that of trust—for as the corporation had the legal title, the stockholders could not be treated as trustees; and that the interest of a stockholder in a corporation is not an equitable interest is the well settled modern doctrine. It follows that to say that under such circumstances the business and property were “substantially Salomon’s” means nothing. Either the business and property were Salomon’s or they were not. If it be assumed that they were, the assumption is inconsistent with the finding of the Court of Appeal that a corporation came regularly into being. If they were not, then they were the property of the corporation, and must be dealt with as having the ordinary incidents of other corporate property. Of fraud there was no evidence. The only suggestion was that the property had been sold by Salomon to the company at an over-valuation and that the sale should therefore be rescinded. In support of this suggestion reference was made to *Erlanger v. New Sombrevo Phosphate Co.*¹ In the Salomon case, however as the House of Lords pointed out, the only persons who could have a standing to allege fraud were the stockholders other than Salomon, and it appeared affirmatively that they knew all the facts and had not been deceived. As the

¹ 39 L. T. Rep. 269: 3 App. Cas. 1218.

corporation could not under this view of the case be treated as the agent or trustee for Salomon, it acquired no right as against him to be indemnified and the reversal of the decision of the Court of Appeal seemed to follow by an inevitable necessity.

It is submitted, therefore, that the suggested theory leads to sound conclusions as between the corporation and the individuals with whom it contracts and that it is in no sense inconsistent with the result worked out by the House of Lords in *Broderip v. Salomon*.

It may be urged, however, that the theory practically involves the conception of a corporation created without the intervention of the sovereign power, inasmuch as under this theory a creditor would be confined to the corporate fund even in a case where the associates had failed to file a certificate or charter under their act or had omitted to comply with some one or all of the most important statutory prescriptions. The answer is that as between the associates and the state there can be no valid exercise of corporate privileges without the consent of the sovereign power. It does not follow from this admission, however, that there may not be such a thing as a quasi-corporation resulting from contract as between a group of associates and those with whom they have business. "Some, again," say Pollock and Maitland,¹ "may feel inclined to say that a corporation must have its origin in a special act of the State, for example, in England, a royal charter; but they again will be in danger of begging a question about ancient history, while they will have the utmost difficulty in squaring their opinion with the modern history of joint-stock companies. Modern legislation enables a small group of private men to engender a corporation by registration, and to urge that this is the effect of 'statute' and not of 'common law' is to insist upon a distinction which we hardly dare carry beyond the four seas."

An economic objection may be made to the theory on the ground that one consequence of it will be the removal of the present sanction of regular organization and the substitution

¹ History of English Law, Vol. I., p. 470.

of state control in a department in which it is most unwise that the state should have control. It may be contended that since corporations represent vast accumulations of wealth and influence, the executive and judicial officers of the state will be subjected to great temptations to stay their hands and to take no steps in the direction of restraining the exercise of corporate privileges by unauthorized persons. In support of this argument, attention is called to the alleged inefficiency of the common law remedy by *quo warranto* as practically administered in our Commonwealths. These are important considerations, but it is submitted that they are by no means as weighty as at first appears. As an answer to the objection it may be said that, from the economic point of view, the wisdom or unwisdom of the suggested development is scarcely open for consideration, because an examination of the reports shows that the stream of tendency has actually carried the courts to the point at which the theory here insisted upon is necessary to give a legal explanation of their position. The theory is not made "out of the whole cloth," but represents an attempt to explain the observed phenomena of judicial decision and to facilitate the extinction of a few anachronisms which mar the uniformity of the law. In the second place, attention is called to the fact that the questions of irregular incorporation with which the courts have had to deal do not appear to have arisen in the case of corporations of great wealth and influence. In other words, it has been true in the past, and it will continue to be true in the future, that strict compliance with statutory provisions is the best policy to be pursued by those who propose to stake large interests in the corporate enterprise. The questions, as a rule, have arisen in connection with trading corporations doing business in a way that is small when compared with the class of great corporations of which one thinks when a reference is made to corporate wealth and influence. Partnership liability has been sought to be enforced by the creditors of these smaller concerns as a sort of "forlorn hope"—an attempt to obtain recourse to a source of payment to which the creditor did not look when the debt was originally contracted. In many cases,

the questions have arisen as the result of the promotion of wild-cat enterprises and schemes of adventurers who have sought to obtain a share of the profits of some legitimate corporate business established by the enterprise and integrity of large and solvent organizations. In such cases frauds are perpetrated upon creditors, and accordingly the theory recognizes that the elastic decree of a court of chancery is best adapted to meet the exigencies of the situation. The point insisted upon, however, is that the class of corporations which are, in fact, irregularly organized are not in a position to exercise corrupt influence upon administrative officials. In so far as great and powerful corporations are interested in the matter of regular organization at all, their interest is identical with that of the state, for experience shows (in the domain of insurance, for example) that the substantial and solvent insurance companies are the most active in setting in motion the legal machinery for punishing their unscrupulous and fraudulent competitors. Finally, it may be suggested that from the administrative point of view, a system which divides the responsibility of corporate supervision between the judiciary and the executive department is fundamentally unsound. It is believed that if reform is needed in the direction of greater activity upon the part of the state in keeping corporate enterprise within bounds, the way to secure the reform is to emphasize the responsibility of the state and not to shrink from a recognition of it. It must not be forgotten, moreover, that an acceptance of the suggested theory leads naturally to the adoption of stringent legislative enactments imposing fine or imprisonment or both upon those who usurp corporate privileges without complying with the conditions imposed by the state.

Again, it may be objected that, however desirable the results of the suggested theory may be, the acceptance of it is inexpedient as being in effect "judicial legislation" and, therefore, to be condemned as dangerous. It may be said in reply that the modern decisions in regard to *de facto* corporations which have proceeded upon no coherent legal theory are indeed open to criticism as being instances of judicial legisla-

tion, but that no such objection can properly be directed against a theory which is, after all, nothing more than a generalization from observed facts in social and economic development. The growth of corporate activity amongst us has been a rapid growth, and it has necessitated a rapid development of our legal ideas. It used to take centuries for legal doctrines to attain maturity, but in these days each decade makes a definite contribution to our jurisprudence. When the judges move faster than society, they are justly criticised for legislating from the bench. It is an open question whether or not they are acting judicially when they merely keep abreast of the march of social progress. The suggested theory, it will be observed, does not require them to do more than keep a respectful distance behind the front of the column.

A study of the English Reports seems to indicate that in England the problems of irregular organization have heretofore been dealt with in a different way. There has been no gradual growth of decisions of the class summarized in the former paper and drawn upon as the source of the suggested theory. The English solution of the problem of irregular incorporation must, therefore, be a legislative solution. Indeed, this fact has been recognized by our English brethren, and a Committee recently appointed by the Board of Trade to inquire into the matter of the formation and management of companies have made a most elaborate and interesting report in favor of an amendment of the Companies Act and have annexed to their report a draft of a bill to accomplish the needed reform. This report and the draft of the bill have come into the hands of the present writer since the publication in this magazine of the first paper on irregular incorporation, and after the present paper was mapped out. It is interesting to note that the draft of the bill reported by the Committee (so far as it deals with the question of irregular incorporation), in effect puts the suggested theory into actual operation. Section 1 provides that a certificate of incorporation given by the registrar in respect of any association, shall be conclusive evidence that all the requisitions of the Companies Acts, in respect of registration and all matters precedent and incidental

thereto, have been complied with, and that the association is a company authorized to be registered and duly registered under the Companies Acts. Section 36 provides that the company may be wound up (*inter alia*): "Where the court is satisfied that a certificate of incorporation has been obtained by fraud, misrepresentation or mistake or by a wilful violation of any provision of the Companies Acts; or where the court is satisfied that the Company was formed or that its business has been carried on with the intent or in such manner as to defraud, defeat or delay the creditors of the company, or of any other company, or for any fraudulent or illegal purpose." The learned Committee (which included Lord Davey, Sir Joseph William Chitty, Sir Roland Vaughan Williams, and a number of other distinguished men), formulated their report at a time when the appeal in *Broderip v. Salomon* was still pending in the House of Lords. The Committee annexed the opinions of the judges in the Court of Appeal to their report and after summarizing the decision of that tribunal, used the following language: "If this view be correct, it appears to your Committee unnecessary to suggest any amendment to the existing law; but they think that some addition to the grounds upon which a winding-up order may be made, would be desirable in order to meet such cases as that of Aron Salomon, and possibly also cases of the kind to which the Pharmaceutical Society and the Medical Associations have called attention.¹ They have accordingly suggested a clause making it a cause of winding-up (a) where a certificate of incorporation has been obtained by fraud, misrepresentation, or mistake, or by a wilful violation of any provision of the Companies Acts, or (b) where the Court is satisfied that the company was formed or that its business has been carried on with the intent or in such manner as to defraud, defeat, or delay the creditors of the company or of any other company or person, or for any fraudulent or illegal purpose; and in such cases giving the court power

¹ These were cases in which persons sought to evade the provisions of the Pharmaceutical and Medical Acts by becoming incorporated and thus putting themselves beyond the terms of those statutes. The Committee were of opinion that this evil could best be dealt with by amending the Pharmaceutical and Medical Acts.

to declare the liability of any one or more of the members for all or some of the debts to be unlimited. They also propose that in such cases the Attorney-General may petition. But your Committee cannot recommend any general enactment rendering the members liable without limit where there are seven members, but some of those members do not hold what may be called a substantial interest, or are trustees only for other persons. . . . It is not usually the creditors of the original owner of the business who suffer, but the creditors of the company. Now, so long as the company is a going concern, and pays its way, no harm is done to anybody. But when the company fails to pay its creditors it may be wound up, and in that event the power proposed to be given to the court in aid of the existing law would come in and enable the court if one or a few individuals have been carrying on business under the cloak of a company in abuse of the Acts to make them liable. It is further suggested that persons conspiring to defraud by means of such devices as described in Aaron Salomon's case are amenable to the criminal law." What amendments will be suggested in view of the decision of the House of Lords is, of course, only a matter of conjecture. The point upon which it is desired to insist is that our English brethren recognize (1) the importance of treating the certificate as conclusive, (2) the wisdom of enlarging the remedy by compulsory winding up and by petition of the Attorney-General and (3) the expediency of imposing criminal penalty for abusing the privileges conferred by corporation laws. It may be remarked incidentally that the volume containing the report will amply repay careful study, for it evidences a most thorough and satisfactory investigation of the whole subject by the learned Committee, and a determination upon their part to familiarize themselves with the practical operation of corporation laws and companies' acts in Germany, France and in the United States. The report is in itself a lesson upon the right way in which to prepare an act of legislature.

It is submitted, in conclusion, that there is reason for believing that both the English experience and our own tend

to establish the soundness of the result which can be reached by applying the suggested theory. In England the state of legal development is such that the result can be attained only by an Act of Parliament. With us, such progress has been made by the courts in the direction of a solution satisfactory to the world of industry and commerce, that no obstacle stands in the way of the acceptance by the judges of a theory which provides the necessary safe-guards for the purchasers of shares, which makes ample provision for the supervision and control of corporate activity and to a great extent banishes that anachronism the *de facto* corporation from the realm of private litigation.

George Wharton Pepper.

Philadelphia, March 1, 1897.

ROMAN LAW IN AMERICAN LAW SCHOOLS.

Should the Roman law be included in an American scheme of legal education? If so, should it be treated as an optional, an elective, or a required study? And if required, how much should be required? The answer to the third question may be postponed until the first two questions are answered. These every man will answer according to the theory which he holds, consciously or unconsciously, regarding the purpose of legal education.

I.

. One tenable theory of the function of a law school—a theory which seems to be held by the majority of American law teachers—is that such a school exists simply for the purpose of training lawyers. By lawyers the adherents of this view mean practitioners in the field of private law, men who are to give advice upon legal questions that affect the persons or the pockets of their clients and who are to fight their clients' battles, if battles there must be, in the courts of justice. The education that is needed is partly informational. The graduate of a law school, the candidate for admission to the bar, cannot be expected to know all the rules obtaining in every department of private law, but he should know the leading and well-settled rules in each department, and he should know where to go for information upon minuter matters. A more important part of his training is that which deals with method. He has to learn how to handle the original matter of the law. He must learn the art of construing statutes, and the degree of possible difference between a broad and a narrow construction. He must learn the deeper mysteries of interpreting decisions, so that he may marshal precedents skilfully upon the side which he represents and may destroy by "distinction" the precedents similarly marshalled by his opponent.

Given this theory of a legal education, it is easy to show

that knowledge of the Roman law may be useful, but its study can hardly be shown to be needful. Its purely informational value is not great. In most portions of the Anglo-American private law there is more or less Roman law, ancient or mediæval, civil or canon. In some portions there is a great deal of Roman law. It is interesting to know whence the rules of the English law have been derived, but such knowledge is by no means necessary. Where the exact scope and significance of the English rule is disputed, it may be of practical use to show how the rule was interpreted by the great Roman jurists or by the mediæval civilians or canonists. Once in a while a case may be won in this way, but once in a while a case may be won by a knowledge of chemistry or of mechanics. These are, in practice, *casus rariores*. It may be urged, and with truth, that the process of drawing new rules, where new rules are needed, from the apparently inexhaustible storehouse of Roman jurisprudence has by no means ceased. Even within the last hundred years it has been discovered by English courts that old debts can be extinguished by substituting new ones: *Tadlock v. Harris*, 3 Durnford and East, T. R. 174; and that where action is brought against a surety he can set-off a sum owed by the plaintiff not to himself, the surety, but to his principal, the original debtor: *Becherovaia v. Lewis*, 7 C. P. 372; and in each case the decision was drawn directly from the Roman law. These, however, are now *casus rarissimi*. As the English law has grown more complete, the tendency to borrow rules from the Roman law has steadily diminished, and the practice is more likely to become extinct than to increase.

In cases involving conflicts of law the informational value of the Roman law is more considerable. With the increasing movement of persons and property across national frontiers, and with the rapid and unprecedented development of international commerce, the cases have greatly multiplied in which foreign law—really foreign law, I mean, not the law of a sister state—determines the decision of the American courts. To the lawyer who has no acquaintance with Roman law, the legal vocabulary of continental Europe and Latin-America is a stum-

bling-block and the text of their laws is a snare. This practical problem, however, is apparently to be solved by a further specialization of law business. A few lawyers will devote themselves to the study of foreign law, and to these the others will turn for help when help is needed. It may be urged that these specialists should have a chance to prepare themselves for their work in our law schools, and this may be regarded as a valid argument for introducing courses in Roman law, at least in the more important law schools of the East. This argument, however, calls for nothing more than elective courses. It does not justify the introduction of Roman law as a required study. It is no more needful to make every graduate an expert in foreign law than to make every graduate an expert in patent law. And if elective courses are introduced for the benefit of the few students who may wish to make a specialty of foreign law, more stress should be laid on the modified Roman law of modern Europe than upon the law of Justinian's days.

A stronger plea may perhaps be made for the study of Roman jurisprudence as a part of the law student's training in method. In the lax or rigid construction of statutes, and in the determination of the exact value of previous rulings as precedents, the Romans were assuredly not inferior to the best of the moderns. They handled statutes in particular with more freedom than do our lawyers—with somewhat of the same freedom with which our greatest lawyers have handled our federal and state constitutions. But these arts can also be learned from English and American cases; and from the point of view of the intending practitioner, they can best be learned by studying cases in which are set forth the arguments of counsel. For this element in legal training the Roman law offers no exact equivalent. The greatest jurists of the Empire, whose responses and opinions form the bulk of the Digest, had been drawn into the service of the state, and their responses are not briefs, but decisions. Dissenting opinions have in some cases been preserved, with reasons for the dissent, but not arguments of counsel. In the accepted opinions and in those which were not accepted, the controlling influence

was, of course, the interest of society at large, and not the advantage of any individual; and in so far the Digest furnishes better training for a judge than for a practitioner.

It may, of course, be said that our law schools in educating practitioners educate some who will be judges; and if it be admitted that a broader training, or a training in any way different from that required by a barrister, is needed by a judge, then it must be admitted that the theory of legal education upon which our discussion has thus far been based, is an imperfect theory even from the practical point of view. But the advocates of the technical, or trade-school theory, do not concede the necessity of a different training for the judicial office. They take things as they are, and base their theory upon the established Anglo-American custom. It has long been usual, both in England and in America, to take the judges from the bar, and therefore the law school may be content to train good barristers. If special qualifications are needed in the judicial office, they presumably come with the ermine. All this is thoroughly Anglo-Saxon, and in accordance with the old German saying: "To whom God gives an office, to him He gives understanding also."

II.

There is, however, a second possible view of the function of legal education, and of late years there are signs that this view is beginning to gain wider acceptance. The old and sound tradition is reviving that law is not a trade, but a profession; and by a profession is meant not merely a trade that requires more than the average breadth of mental grasp and an uncommon subtlety of discrimination, but something else and something more. By a profession is meant a calling that subserves the interests of society as well as the interests of individuals, and that places, or should place, social welfare above individual advantage. There is no basis for the honor traditionally accorded to the professions as compared with the trades except the recognition and expectation of social service. There is no other reason for the endowment of professional schools, or for the maintenance of professional

schools by an endowed university. If society pays part of the cost of a man's education, it is because it expects to recover its outlay through that man's services. What the services are which society expects from its lawyers, what the duties are which it imposes, is clear enough. The legal profession is custodian of the most important element of social life—the body of rules which are necessary to the existence and progress of society, and to which, accordingly, society constrains obedience through the strong arm of political power. Nor is our profession simply custodian of the law which society has created; it shapes the new law which the constantly changing needs of social life require. This great service, and the duties it entails, cannot be thrown off upon the shoulders of the judges and the legislators. Apart from the fact that the majority of our legislators and all of our higher judges come from the bar, it is impossible that these should do their work in the best way without the sympathy and support of the bar.

From this point of view, the problem of legal education is far less simple than it appears to the advocates of a purely technical training. Private law—the law of family and of property—cannot be divorced from public law. It can be thoroughly comprehended only in its relation to public law. This relation is not one of independent co-existence, but of organic interdependence. Each supplements and modifies the other. Hence the necessity of introducing into the curriculum of our law schools far more international, constitutional and administrative law than has heretofore found place there. Hence the necessity of giving to constitutional law, as taught in our schools, a different and a wider meaning. Constitutional law should not be taken to signify merely the protection of individuals and their property against governmental encroachment; it should be taken in its legitimate sense, as including the organization of our entire political system.

Nor can law be really understood by studying it simply as it is to-day. We really comprehend things only when we know how they have come into existence and how they have grown to their present form. To the lawyer, as a professional

man, some knowledge of the history of our law is absolutely essential. It is one of the great merits of the case system that it gives glimpses of the evolution of legal rules. But general courses in English legal history, which shall show the development not merely of this or that legal institution but of the law as a whole, are greatly needed.

Nor can the law be really understood, as it should be understood by those who are its makers and its guardians, by studying law alone. It can be really understood only in its relation to ethics, politics and economics. Unless the law student has been thoroughly grounded in these subjects before he begins his law studies—and how few of our American law students are thus grounded!—these matters also must find some place in the scheme of legal education.

At present it is only in a few of our larger universities that any attempt is made to meet these needs. At such universities there have been established, side by side with the law schools, schools of political science or graduate courses in the political sciences; and courses in history, public law, economics, etc., have been thrown open to the law students, in some cases as optional courses only, in some cases and to some extent as elective courses leading to the law degree. This solution of the problem is inadequate. In all our law schools, even in those that are associated with our greatest universities, the traditions of the technical school are still dominant among the students themselves. To most of them law means private law; public law is politics. To most of them history, ethics and economics seem matters as remote from law as are geology, theology or *belles-lettres*. At the same time the work of the law schools has been growing more and more minute and intensive in the field of private law; and in spite of the extension of the law course from two years to three, the pace of the work has been quickened. Under the optional system, therefore, hardly any of the law students can make use of the new opportunities extended to them; and even under the elective system the number who strive to broaden their education is comparatively small.

Judging from European tendencies, this method of dealing

particular development of Roman law and of English law will first be wholly intelligible when each is regarded as a stage in the development of the law of the world.

A professor in one of our university law schools was accustomed, as I have been told, to open his first lecture by declaring that it was not his intention to treat of the law of England, or of the law of the United States, or of the law of his own commonwealth, but of law. This announcement, of course, exaggerated purposely the point which he desired to emphasize; but it will serve to illustrate the point which I am trying to make. A science of English law or of Anglo-American law is as inconceivable as a science of Anglo-American ethics or economics. It is, indeed, as unthinkable as a science of American physics, or mechanics.

It follows that, for the scientific study of law, some knowledge of the Roman law is absolutely necessary; for the civilized world is ruled to-day by two great systems of private law, the English and the Roman, and as soon as the student, who is to employ the comparative method, emerges from the English law, he plunges into Roman law.

From the purely scientific point of view, moreover, the study of the Roman law, ancient and modern, is more important than the study of the English law. The latter, as far as it is an independent product, is the product of a shorter period of conscious, reflective development—a period that covers scarcely one-third of the centuries that have been consumed in the development of the modern Roman law. The English law, again, is the product of the genius of a single highly-gifted race. The Roman law of to-day is the product of the coöperation of all the other races that have helped to make general history. Even in the ancient world the institutions and customs of all the Mediterranean peoples were fused by a process of selection that was partly automatic and partly reflective, into the universal law, the *ius gentium* of the Roman empire; and in the scientific elaboration of this law Romans, Greeks, Semites, Gauls and Spaniards labored side by side. In mediæval Europe a new element was added to this already cosmopolitan law by the introduction of Teutonic institutions

and ideas; and in the further scientific development of this wider *ius gentium* all the modern nations of continental Europe have had a share.

If an example be needed to demonstrate the scientific value of Roman law to the English jurist, it is only necessary to compare the jurisprudence of Bentham and Austin, itself not uninfluenced by the "dust of the Roman jurisprudence" which they had half consciously inhaled, with the jurisprudence of Holland and Pollock, vitalized by a deeper inspiration of living Roman law.

IV.

I have examined the questions proposed in the light of what seems to me the three possible theories of legal education. Which of these theories, now, shall we accept as the true theory? For me, each has its justification, and each should obtain at least partial recognition. The American law school must train practitioners—that is, indeed, its primary purpose—and it should so train them that they may earn a livelihood, for this is the immediate end which nearly all men must set before themselves. But it should not content itself with this. It should strive to make of all its graduates professional men, imbued with the spirit of public service and fitted to discharge the duties which our social organization and our national custom impose upon the legal profession. And it should strive to imbue all of them with the scientific spirit, not merely because the scientific spirit brings with it the professional spirit in its highest and purest form, but for the sake of legal science itself, of which our law schools should be the great and general reservoir. And besides awakening in the minds of all of its students, as far as this is possible, the scientific spirit, the law school should provide special training for the chosen few who are able and willing to devote their lives to the investigation of legal history and jurisprudence. This our university law schools, at least, should do; for a university that contents itself with the preservation of the inherited capital of science, and makes no provision for its increase, is a university only in name.

with the problem of professional education in law is probably destined to prove a temporary and transitional method. On the continent of Europe public law has long constituted a required part of the legal education, and of recent years courses in economics are beginning to be required.

But what of the Roman law? Are its claims stronger in the professional school than in the technical school? They are certainly stronger, but not even from this point of view are they imperative. When the history of English law is studied, we find the influence of Roman law, civil and canon, increasing as we go backward. To the lawyer who studies English legal history as an investigator, with the intent of increasing our stock of knowledge, a considerable acquaintance with ancient and mediæval Roman law is necessary. But to the lawyer who studies English legal history merely to gain a better comprehension of the existing Anglo-American law, the Roman law, however useful, is not necessary. The same statement must be made as regards the study of public law, and as regards the study of economics and of ethics. To the historical investigator in these fields, some knowledge of Roman law is, I think, necessary. To the ordinary student it is of advantage, but it is not necessary. In public law, in economics, and in ethics, the elements derived from the Roman civilization have been so largely assimilated and transmuted that the ordinary student can get the results of the historical process without going back to its beginnings.

From the point of view of professional education, accordingly, the demand for elective courses in Roman law is stronger than from the point of view of technical education; but it is still a demand for elective courses only, and not for a required course.

III.

A third view of law and of legal education—a view which all our teachers of law accept in theory, but which many of them disregard in practice—is that law is not a trade merely, nor a profession merely, but a science, and that legal educa-

tion should be scientific. This view is not wholly incompatible with the theory that law schools exist simply to produce practitioners in the field of private law, for the training given in private law may be more or less scientific. Much less is this view incompatible with the theory that law is a profession, and that social duties of the greatest importance rest upon the bar. It has always been felt instinctively that the true professional spirit—the spirit of public service—is most fully developed among men who regard the subject-matter of their profession as a science; and it is the testimony of the world's experience that such men serve society most gladly and most effectively in laboring for the advancement of their chosen sciences. From the scientific point of view, also, there is the strongest reason for including in the legal curriculum legal history, public law, economics, and ethics; for every true science studies and presents its material in the light of its development and in its relations to allied sciences.

But every true science employs a method of which the technical and professional schools make little use. This method is comparison. It is pre-eminently *the* scientific method; without the employment of the comparative method, no body of knowledge regarding the facts of the physical world or the facts of social life can take rank as a science.

In considering law from the technical and professional points of view, we have considered it as a national system. We have considered Anglo-American law alone. But law, though primarily a national product, is also a human product. Social organization is always fundamentally the same among peoples standing on the same plane of social evolution. Many of its basic facts are constant throughout the course of human history. Many of the problems with which English and American lawyers have to deal are problems with which the Roman jurists dealt; all of them are problems with which the jurists of modern Europe are dealing. Nor is law human in this sense only—that the problems confronted and the conditions of their solution are everywhere similar—but also in the sense that its development has been human. There is, and there will some day be written, a history of law; and the

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR FEBRUARY.

According to a recent decision of the Supreme Court of Iowa, under Article 6 of the Constitution of the United States, which provides that the constitution, laws made in pursuance thereof, and federal treaties with foreign countries, shall be the supreme law of the land, notwithstanding anything in the constitution or laws of a state to the contrary, a federal treaty with a foreign country, conferring on its subjects, in spite of their being aliens, a qualified right to take lands in the United States by inheritance, under the laws here controlling its descent, must prevail over a state law prohibiting aliens from taking land by descent; and the fact that such a treaty removes from such aliens the disability to inherit imposed by a state statute, does not alter the laws of descent of a state so as to render it unconstitutional, as an infringement of the right of the state to control its internal policy: *Opel v. Shoup*, 69 N. W. Rep. 560.

Aliens,
Right of
Inheritance,
Conflict of
Laws,
Federal
Treaties and
State Laws

If a citizen or subject of a foreign government is disqualified under the laws of a state from taking, holding, or transferring real property, such disqualification will be removed, if a treaty between the United States and such foreign government confers the right to take, hold or transfer real property, whether the disqualification be by common law or express statute: *Ware v. Hylton*, 3 Dall. 199, 1796; *Fairfax v. Hunter*, 7 Cranch, 603, 1813; *Chirac v. Chirac*, 2 Wheat. 259, 1817; *Orr v. Hodgson*, 4 Wheat. 453, 1819; *Society v. New Haven*, 8 Wheat. 464, 1823; *Haucenstein v. Lynham*, 100 U. S. 483, 1879; *Geofroy v. Riggs*, 133 U. S. 458, 1889, reversing 7 Mackey, (D. C.) 331, 1889; *People v. Gerke*, 5 Cal. 381,

1855; *Schultze v. Schultze*, 144 Ill. 290, 1893; and if the treaty is susceptible of two interpretations the more liberal is to be preferred: *Hauenstein v. Lynham*, 100 U. S. 483, 1879; *Schultze v. Schultze*, 144 Ill. 290, 1893. A statute imposing a succession tax, however, does not violate a treaty giving aliens the same rights of inheritance as citizens: *In re Stroble's Estate*, 39 N. Y. Suppl. 169, 1896; and a treaty providing that the citizens or subjects of a foreign country "shall have free access to the tribunals of justice in their litigious affairs on the same terms which are granted by the law and usages of the country to native citizens or subjects," does not preclude the United States from giving special rights of action to its own citizens in particular cases to the exclusion of some or all aliens: *Valk v. United States*, 29 Ct. of Cl. 62, 1894. "Moreover, the treaty, which will suspend or over-ride the statute of a state, must be a treaty between the United States and the government of the particular country of which the alien, claiming to be relieved of the disability imposed by the state law, is a citizen or subject. A treaty with some other country, of which such alien is not a citizen or subject, cannot have the effect of removing the disability complained of:" *Wunderle v. Wunderle*, 144 Ill. 40, 1893.

The fact that a law regulating inheritance by aliens may thus be rendered inoperative as to certain of those embraced within its terms does not make it a special statute, or a discrimination against those who are still affected by it, within the constitutional prohibition of such legislation: *Wunderle v. Wunderle*, 144 Ill. 40, 1893.

As long as the ancestor is still living, the alien heir has no rights: *Wunderle v. Wunderle*, 144 Ill. 40, 1893; but when once the title to land has vested, it cannot be divested by a repeal of the treaty: *Carneal v. Banks*, 10 Wheat. 181, 1825.

A statute making it a crime for a contractor with a municipal corporation to employ an alien as a laborer on public works, violates the treaty between the United States and Italy, which provides that resident Italians in the United States shall enjoy the same rights and privileges as are secured to our own citizens: *People v. Warren*, 34 N. Y. Suppl. 942, 1895.

If this view be accepted, I think it must be recognized that some knowledge of Roman law should be required from every candidate for a law degree; and that advanced elective courses should be established in European legal history and modern European law for the few who desire to devote themselves to the widening of the borders of legal science.

If the preceding discussion be viewed by any reader as a brief for the Roman law, he will wholly mistake the spirit in which it has been written. Had I undertaken to plead, as an advocate, for the study of Roman law in American law schools, I should have claimed far more, and conceded much less. I have striven to take a judicial rather than a partisan view of the claims of the Roman law, and in all doubtful points I have charged rather against than in favor of claims which my prejudices would lead me to support.

V.

The question remains to be considered, how the Roman law should be studied. To answer this question we must consider what are the most valuable portions of that law—the portions that constitute a permanent contribution to legal science.

The most valuable portion of the Roman law is incontestably the private law. The whole doctrine of private rights was first clearly worked out by the Romans, and these rights were formulated with a sharpness of outline which no Teutonic system of law has ever equalled. In the Roman private law special stress should be laid upon the law of things, and upon that of contractual and quasi-contractual obligations. The law of testaments should be noticed, but with less detail. Roman succession *ab intestato* deserves little attention. It is of even less scientific value than the order of succession in the Code Napoléon. Both are arbitrary things, but the latter is of more interest *de lege ferenda*.

The Roman law of personal status and of the family relations should be relegated, for the most part, to the limbo of legal antiquities. To the American law student the legal status of the *Latini Iuniani* is of less consequence than that of the German *liti*; and the doctrine of *peculium quasi-castrense* is

property law of the early Suabians. Of all this portion of the Roman law so much only is needed as may be necessary to understand cases in the Digest which deal with property rights or obligations, but which turn in part upon the relation of husband and wife, father and son, or master and slave. And, perhaps, even so much had better be taught incidentally, in discussing the cases, than set forth dogmatically in a course on the Institutes.

It is the great fault of the attempts now making to introduce the study of the Roman law in England and in America that too much time is devoted to the Institutes of Justinian, and too little, if any, to the Digest. The latter is a vast repository of case-law, from which a judicious instructor can select matter of permanent value. The former is an attempt to set forth dogmatically, in brief compass, the legal rules which were of chief importance in the sixth century. It includes, therefore, much that is of purely antiquarian interest. In England, where the Institutes are now a required study, the vice of the system shows itself clearly in the cram-books. In Chamier's *Manual*, for example, the student can learn something about the freedmen who were treated like Latins, and about the *peculium quasi-castrense*; but the law of contractual obligations is condensed into thirty-six small pages of heavily-leaded large type, and, as far as I can discover, no hint is given that obligations were assigned by the Romans, as by Englishmen, by making the assignee an attorney in his own interest.

However brief the time that can be devoted to a required course of Roman law in an American law school—and the minimum that could possibly be of any use would be three hours a week for four months—at least half of this time, in my opinion, should be devoted to cases from the Digest—cases similar in their nature and, as far as possible, in the conditions given for their decision, to the cases with which we have to deal to-day. So taught, Roman law should interest the most narrowly utilitarian of students, and to those who have a spark of the scientific temper it should open new vistas of thought and a wider mental horizon.

Munroe Smith.

The Supreme Judicial Court of Massachusetts, in *Coffing v. Dodge*, 45 N. E. Rep. 928, has lately held, that the liability

Conflict of
Laws,
Penal
Statutes,
Liability of
Stockholders
of a Corpora-
tion to
Creditors

of a stockholder of a foreign corporation under the statutes of the foreign state to a creditor of the corporation cannot be enforced in Massachusetts, when it is not alleged to be contractual, or to be so held by the courts of that state. This appears to be a weak evasion of responsibility. It was the business of the court to examine the statute itself, and, with or without evidence as to the construction put upon it by the courts of the foreign state, to construe it according to its own views. Further, one would naturally presume, from the relations of the stockholder and creditor to each other through the medium of the corporation, that such a statutory liability is contractual, rather than penal; and the defendant should establish the latter fact. The court should read the decision of the Privy Council of England in *Huntington v. Atwill*, [1893] A. C. 150, 1892, especially these sentences of Lord Watson's opinion: "Judicial decisions in the state where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The court appealed to must determine for itself in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another state. Were any other principle to guide its decision, a court might find itself in the position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal." The learned judge, having in mind the fact that courts were established to give relief to suitors, never seems to have dreamed of the way out of the dilemma adopted by the Massachusetts court,—that of refusing relief altogether, unless the plaintiff forces its hand.

The decision of the Privy Council was approved and adopted

in *Huntington v. Attrill*, 146 U. S. 657, 1892; so that the weight of authority is overwhelmingly against the Massachusetts rule.

A statute of the territory of New Mexico provides that "whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car, or train of cars, the corporation, individual, or individuals in whose employ any such officer, agent, servant, employee, engineer or driver shall be at the time such injury was committed, shall forfeit and pay for every person or passenger so dying the sum of \$5,000, which may be sued and recovered, first by the husband or wife of the deceased, second, if there be no husband or wife, then by the minor child or children of the deceased." The Supreme Court of Kansas, applying the principle that a penal statute will not be enforced by the courts of a foreign jurisdiction, has refused to enforce the liability created by this statute, since it is in part penal, and gives a right of action to persons other than the one who would be entitled to recover under the laws of that state in a similar case arising there: *Dale v. Atkinson, Topeka & Santa Fe R. R. Co.*, 47 Pac. Rep. 521.

The Supreme Court of the United States has recently declared, in consonance with its prior rulings, that a suit to enjoin state officers from seizing private property under authority of an unconstitutional statute is not a suit against the State: *Scott v. Donald*, 17 Sup. Ct. Rep. 262; and that a suit for damages against state officers, who have seized and carried away private property under color of an unconstitutional statute, is not a suit against the state; within the prohibition of the Eleventh Amendment: *Scott v. Donald*, 17 Sup. Ct. Rep. 265. From this latter decision Mr. Justice Brown dissented.

Constitutional
Law,
Actions
Against
State,
Proceedings
Against
State
Officers

The Supreme Judicial Court of Maine has lately rendered a most valuable decision with regard to the rights of an architect, specially employed, whose plans prove unavailable through an honest mistake of judgment on his part: *Coombs v. Brede*, 36 Atl. Rep. 104.

Architect,
Compensation -
Miscalculation

The court below charged that if the architect was expressly told that the cost of the house designed must not exceed a certain sum, he should either have made plans accordingly, or frankly told his employer that he could not do it, and have declined to do it, and that if he undertook the commission with that specific restriction, he could not recover any compensation, in case the plans called for a house of greater cost. But the Supreme Judicial Court granted a new trial on the ground that this instruction was erroneous, Peters, C. J., defining the rights and duties of the architect as follows :

"We must bear in mind that the plaintiff was not a contractor who had entered into an agreement to construct a house for the defendant, but was merely an agent of the defendant to assist him in building one. The responsibility resting on an architect is essentially the same as that which rests upon the lawyer to his client, or upon the physician to his patient, or which rests upon any one to another where such person pretends to possess some skill and ability in some special employment, and offers his services to the public on account of his fitness to act in the line of business for which he may be employed. The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well ; and that he will exercise and apply, in the given case, his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result. It will be enough that any failure shall not be by the fault of the architect. There is no implied promise that miscalculations may not occur. An error of judgment is not necessarily evidence of a want of skill or care, for mistakes and miscalculations are incident to all the business of life."

The Supreme Court of Pennsylvania has recently declared the just and equitable rule, that a decree for perpetual disbarment of an attorney for attacking the judicial integrity of the court in a manner tending to influence the court in a decision should not be made when the attorney has previously been of good character, and assiduous in his practice, and is past middle life, and therefore is not likely to succeed in any other vocation; and imposed, in the case in hand, a disbarment for two years only, on condition of good behavior, as being sufficient punishment: *In re Smith*, 36 Atl. Rep. 134.

When a transaction made by an officer of a national bank with intent to defraud, is entered on a deposit slip, the entry of the contents of that slip upon the books of the bank, either by the officer personally, or by another under his direction, is the making of a "false entry," within Rev. Stat. U. S. § 5209: *Agnew v. United States*, 17 Sup. Ct. Rep. 235.

In a prosecution of a public officer for accepting a bribe to refrain from the execution of duties enjoined by statute, the defendant cannot raise the question of the constitutionality of the statute: *Newman v. People*, (Supreme Court of Colorado,) 47 Pac. Rep. 278.

According to a recent decision of the Court of Civil Appeals of Texas, which seems to be consonant with the other authorities on the subject, the mere fact that a train fails to stop the usual and reasonable time to enable passengers exercising ordinary diligence to get on and off does not constitute negligence as to a person who gets on to assist a passenger, and is injured in getting off after the train has started. He must give notice of his intention to alight before getting on: *International & G. N. R. R. Co. v. Satterwhite*, 38 S. W. Rep. 401.

The same court, following the current of authority, has decided that the act of Missouri of March 31, 1887, which makes railroad companies liable for property destroyed by fire communicated from their locomotives, and gives them an insurable interest in the property along their roads, is not in excess of the powers of the legislature; and that it is not unconstitutional, as depriving the companies of property without due process of law, or as impairing the obligation of a contract between the companies and the state, by which they are implicitly permitted to use fire in the operation of their roads, or as denying to the companies the equal protection of the laws = *St. Louis & S. F. Ry. Co. v. Mathews*, 17 Sup. Ct. Rep. 243.

The Supreme Court of South Dakota, in *Skinner v. Holt*, 69 W. Rep. 595, has lately held unconstitutional two statutes of that state, which sought to render a life insurance policy exempt from the claims of creditors. The first of these was the act of 1890, c. 51, which provided that a "policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his or her creditors; and an endowment policy, payable to the insured on attaining a certain age, shall be exempt from liabilities from any of his or her debts." This was held to violate the following provision of the state constitution: "The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws, exempting from forced sales a homestead, the value of which shall be limited and defined by law, to all heads of families, and a reasonable amount of personal property, the kind and value of which to be fixed by general laws," on the ground that "a law which, without any limitation as to value, specifies a kind of property that a debtor, solvent or insolvent, may acquire, by investing therein or diverting thereto his entire estate, to the exclusion of bona fide creditors, is neither 'wholesome' in character nor

'reasonable' as to amount, and is by far too generous to be just."

The other act was that of 1895, c. 89, which provided that "the avails of any policy or policies of insurance heretofore or hereafter issued upon the life of any person, and payable upon the death of such person to the order, assigns, estate, executors, or administrators of the insured, and not assigned to any other person, shall, if the insured in such policy at the time of death reside or resided in this state, and leave or left surviving a widow or husband or any minor child, to an amount not exceeding in the aggregate the sum of five thousand dollars, inure to the separate use of such widow or husband or minor child or children or both, as the case may be, independently of the creditors of such deceased, and to such amount shall not in any action or proceeding legal or equitable be subject to the payment of any debt of such decedent." This was held to contravene Article 1, § 10, of the Constitution of the United States, which enacts that no state shall pass any law impairing the obligation of contracts, and with Article 6, § 12, of the constitution of South Dakota, which contains substantially the same provision.

The Supreme Court of Pennsylvania, in a case of great local interest, *Smith v. Times Pub. Co.*, 36 Atl. Rep. 296, has succeeded in overturning all established precedents as to the functions of an appellate court in regard to the question of damages. In the first place, it construes an act passed May 20, 1891, P. L. 101, which provided that "the Supreme Court shall have power in all cases to affirm, reverse, amend or modify a judgment, order, or decree appealed from, and to enter such judgment as the Supreme Court may deem proper and just, without returning the record for amendment or modification to the court below, and may order a verdict and judgment to be set aside and a new trial had," as giving it the power to reverse a verdict on the sole ground that the damages are excessive; and then upholds the act thus construed, as not in violation of the constitution of Pennsylvania, Art. 1, § 6, declaring

**Jury Trial,
Excessive
Damages**

that "trial by jury shall be as heretofore." See note in this issue.

In *State v. Bockstruck*, 38 S. W. Rep. 317, the Supreme Court of Missouri, Division No. 2, held constitutional the act of that state of April 19, 1895, which prohibits the manufacture or sale of any substitute for butter so colored as to resemble butter, as being within the police power of the state; and that the fact that portions of the statute were unconstitutional, did not render it also unconstitutional as to the other portions. The court further held that the provision of § 8 of the act, that "whoever shall have possession or control of any imitation butter, or any substance designed to be used as a substitute for butter, contrary to the provisions of this act, shall be construed to have possession of property with intent to use it, as a means of committing a public offence," did not contravene Article 4, § 53, of the constitution of Missouri, which prohibits the passage of any special law changing the rules of evidence.

When a majority of the voters who vote upon a constitutional amendment submitted to the people of the state at a general election, vote in favor of the adoption of the amendment, the same is ratified, though the votes cast in its favor are not a majority of the votes cast for state officers at the general election. A majority of those who actually vote thereon is all that is required, in the absence of express provision: *Green v. State Board of Canvassers*, (Supreme Court of Idaho,) 47 Pac. Rep. 259.

Judge Stirling, of the Chancery Division of England, has lately ruled that the principle that a publishing agreement between an author and a publisher, or a firm of publishers, is personal to the individuals entering into it, and that the benefit of such a contract is not assignable without the author's consent, applies equally to the case of a similar agreement between an author and a limited company: *Griffith v. Tower Pub. Co., Ltd.*, [1897] 1 Ch. 21.

In a recent case in the Circuit Court for the Northern District

of Illinois, N. D., it appeared that the Distilling and Cattle-Feeding Company, which manufactured and sold spirits, etc., issued to the purchasers of its goods what were called "rebate vouchers," by which, for the purpose of securing the continuous patronage of the customer, it promised to pay him, in six months, a sum equal to five cents per gallon of the goods purchased by him. These vouchers provided that they should be valid and payable "only on condition" that the purchaser and his successors should, during the six months specified, have bought all his supply of such goods from the Distilling and Cattle-Feeding Company, or certain persons named as its distributing agents. The company having been placed in the hands of a receiver, certain of these vouchers were presented to him for allowance by persons who claimed to be equitable assignees from the persons to whom they were issued. It further appeared that the condition as to continued purchases from the company had not been complied with. Upon these facts, it was held that the vouchers did not create a present obligation to pay the rebate, subject to be defeated by a breach of the condition, but that the obligation would arise only on performance of the condition, and that, therefore, even if the condition should be held illegal, there would be no obligation without performance; that it did not appear from the contract that the rebate was a sum paid in excess of the price of the goods sold, and that it could not be recovered back as money of the customer paid on an illegal consideration, and held by the company; that no engagement could be implied that the company's products should be offered during the six months at reasonable prices, or without further rebate vouchers, conditioned on still further patronage; and that the vouchers were not illegal or against public policy: *Olmstead v. Distilling & Cattle-Feeding Co.*, 77 Fed. Rep. 265.

A contract for the sale of the fixtures of a post office, by which the seller, who was then postmaster, agreed to resign, and to use his influence to secure the appointment of the purchaser to the office, has been lately declared by the Supreme Court of Arkansas to be

Illegal
Consideration,
Rebate
Vouchers

Public Policy,
Sale of
Public Office

void, as against public policy: *Edwards v. Randle*, 38 S. W. Rep. 343.

The court also held that money paid under the contract could not be recovered on the refusal of the seller to perform. In the opinion of the Supreme Court of California, competing for premiums offered by an association on horse races is not competing for bets and wagers, and the payment of entrance fees to the association for the privilege of competing in a race for which a premium is offered does not make the transaction a wager between the competitors; and accordingly, an agreement between two owners of horses to pool all premiums and stake moneys awarded on their horses, and to divide the same equally, is valid: *Hankins v. Ottinger*, 47 Pac. Rep. 254.

The Court of Appeal for Ireland has recently held, affirming the judgment of the Queen's Bench Division, that, as far as the right of contribution between co-debtors is concerned, the statute of limitations begins to run from the date at which one of them is damaged by being compelled to pay more than his just share of the joint debt; and that accordingly, when one of several co-principals to a note has made payments thereon so as to toll the statute, and being consequently liable to pay the whole note, does pay it, he can recover against his co-principals, though the creditor is barred by the statute from recovering from them: *Gardner v. Brooke*, [1897] 1 I. R. 6.

In *Ernest v. Loma Gold Mines, Ltd.*, [1897] 1 Ch. 1, the Court of Appeal of England has affirmed the decision of Justice Chitty, [1896] 2 Ch. 572, (see 35 Am. L. Reg. N. S. 775,) that on a *viva voce* vote, at a meeting of a corporation, the vote of each person who holds a proxy must be counted as a single vote, and not as a vote for each person for whom he holds a proxy; and that when a notice calling a special meeting was accompanied by a circular from the secretary and directors with a proxy attached, asking for the return of the proxy in support of the resolution, the date of the meeting

Wagers.
Premiums.
Horse Races.
premium
between
between
stake
equally.
Contributions.
Co-debtors.
Limitation.
In
Court
of
Corporations.
Meeting.
Vote.
Viva
Vox.
holds
ing
directors
proxy in

being left blank in the proxy by a printer's error, and several of the members executed and returned their proxies duly stamped without filling up the blanks, which were filled up by the secretary before the proxies were lodged with the corporation, the proxies were valid.

In an action against the directors of a corporation for paying dividends out of capital, the directors may show, in defence, that certain notes which, if they had been properly classed as losses, would have left the corporation without a surplus on the day the dividend was declared, were afterwards paid in full, so that no actual loss was sustained by the payment of the dividend: *Dykman v. Keeney*, (Supreme Court of New York, Appellate Division, Second Department,) 42 N. Y. Suppl. 488.

In the same case, it appeared that, before the declaration of the dividend, the defendants, after consulting the superintendent of the banking department, delivered to the bank their individual notes, together with a memorandum, reciting that the notes were given to remove a doubt as to the character of some of the receivables of the bank, and to make the bank unquestionably solvent. After the failure of the bank these notes were paid to the receiver. Under these circumstances it was held that the money so paid, in excess of the amount necessary to make good the impairment of capital existing when the notes were given, should be applied on the liability of the defendants arising out of the declaration of the dividend.

When a person who has committed a criminal offense fraudulently procures himself to be prosecuted and convicted before a justice of the peace, or other tribunal having jurisdiction thereof, which imposes an insignificant penalty, and the purpose of the proceedings is to avoid a real prosecution and punishment for the offense committed by him, such conviction is not a bar to a prosecution brought in good faith, where the state is a party in fact as well as in name: *State v. Smith*, (Supreme Court of Kansas,) 47 Pac. Rep. 541.

Illegal
Dividends,
Liability of
Directors

Criminal Law,
Former
Conviction

The Supreme Court of Appeals of Virginia has recently held, *that* in passing upon the right of nominees for public office to appear upon election ballots, the courts will recognize the right of the nominating convention to judge of the election, qualifications and returns of its delegates, and will not go back of its action to inquire into the right or title of delegates admitted by it to act as such: *Marcum v. Ballot Cases*, 26 S. E. Rep. 281.

The Act of New York of 1896, c. 909, § 56, provides that "If there be a division within a party, and two or more factions claim the same, or substantially the same device or name, the officer aforesaid [the secretary of state] shall decide between such conflicting claims, giving preference of device and name to the convention or primary, or committee thereof, recognized by the regularly constituted party authorities; and if the other faction or factions shall present no other device or party name, the said officer shall select a different device and party name for each such other faction, which shall be used upon the ballots to distinguish its ticket. If two or more conventions are called by different authorities, each claiming to represent the same party for that purpose, the said officer shall select a suitable device and party name to distinguish the candidates of one faction from those of the other, and the ballots shall be printed accordingly." In *People v. Roosevelt*, 45 N. E. Rep. 840, the Court of Appeals of New York held, affirming 41 N. Y. Suppl. 572, that this section applied not merely to factions within a party, but also to a contest between two or more conventions, each claiming to regularly represent a political party. (See 36 Am. L. Rev. N. S. 132.)

In *State v. Lesueur*, (Supreme Court of Missouri,) 38 S. W. Rep. 325, a petition of nomination of "Silver party" candidates, which called for presidential electors who "will appear on the Democratic ticket," was signed by a number of voters. Subsequently five

Nomination
by Petition,
Signers

of the Democratic electors resigned, and their places were filled by nominees of the Populist party, and a new Silver party petition was then prepared, which contained the names of all the Democratic electors, including the fusion candidates. To this petition was attached the signatures of the former petition, which had been cut therefrom. It was held that the names thus attached could not be considered in ascertaining whether the new petition had the requisite number of signers.

When the secretary of state has transmitted to the county officers the form of ballot to be used at an approaching election, immediately upon the expiration of the time allowed for correcting certificates of nomination, he will not be compelled to instruct the county officers to omit from the ticket the name of a candidate who withdrew after the form of ballot was thus transmitted, if no nomination has been made to fill the vacancy: *State v. Taylor*, (Supreme Court of Ohio,) 45 N. E. Rep. 715.

Withdrawal
of Candidate.
Omission of
Name
from Ticket

Much to the surprise of any one who has followed the decisions of that body, the Supreme Court of Pennsylvania has lately decided that a policeman on duty, who, on a rainy night, attempts to remove with his mace a broken wire hanging from a pole in a street on his beat, is not necessarily chargeable with contributory negligence, though he knows that the wire is charged with electricity: *Dillon v. Allegheny County Light Co.*, 36 Atl. Rep. 164.

Electric
Wires,
Contributory
Negligence

The Supreme Court of Appeals of West Virginia following the now well settled rule that equity has jurisdiction, by injunction, to prevent acts which will result in irreparable injury, has recently held that it will interfere in such a case, even though there is a controversy as to title between the parties, and having once acquired jurisdiction on this ground, will go on to give full relief, though in so doing it becomes necessary to decide between two adverse titles: *Bettman v. Harness*, 26 S. E. Rep. 271. It also held that the abstraction of petroleum oil or gas, they being part of the land, is an irreparable injury, and will be enjoined.

Equity,
Jurisdiction,
Full Relief

Under constitutional provisions, Const. Nev. § 17, that if, during a vacancy in the office of governor, the lieutenant-governor die or become incapable of performing the duties of the office, the president *pro tempore* of the senate shall act as governor till the vacancy is filled, and (§ 18) that in case of a vacancy in the office of governor, the powers and duties of that office shall devolve on the lieutenant-governor; a vacancy in the office of governor, creates no vacancy in the office of lieutenant-governor, and one elected to that office before expiration of the term for which the last elected lieutenant-governor was chosen has no claim to that office: *State v. Sadler*, (Supreme Court of Nevada,) 47 Pac. Rep. 450.

The Supreme Court of New Hampshire has recently decided, that under the married women's property acts, and the other enabling statutes which have removed the wife's disabilities, she may now, after her abandonment by her husband, acquire a separate domicile in another state; and on her death her estate will be administered under the laws of the new domicile: *Shute v. Sargent*, 36 Atl. Rep. 282.

In the case in hand, the husband, who was domiciled in Massachusetts, had expressed his assent to his wife's will in writing on the back, as required by the statutes of that state, while they were living together as husband and wife. After the abandonment, the wife became domiciled in New Hampshire, whose laws do not recognize the binding nature of such an assent, and the court decided that it was inoperative, and that the husband took his share of her estate under the distribution law of New Hampshire.

In *Jack v. Kints*, 177 Pa. 571, the Supreme Court of Pennsylvania held that the married women's acts do not remove the burden that rests on her of proving title to the property she claims against her husband's creditors; and that when the conveyance to her is from her parents, she must, in a contest with her husband's

creditors, prove that she paid for it with her own money, or that it was a gift to her.

This case has excited considerable comment; but it is really no more than a repetition of the generally acknowledged rule, that the married women's acts only remove the disabilities of coverture as to the possession and control of property, and do not affect its other incidents. In this case, the bone of contention was not the wife's possession of the property but the manner in which she acquired it.

An association that contracts with its members, in consideration of the payment of a specified annual sum, to repair bicycles in case of accident, and to replace those destroyed by accident or stolen, but not to pay any money, is not an insurance company, which must be chartered under the act relating to such companies, but may lawfully do business under the clause of the general corporation act, which permits incorporations for "the maintenance of a society for . . . protective purposes to its members from funds collected therein:" *Commonwealth v. Provident Bicycle Assn.*, (Supreme Court of Pennsylvania,) 36 Atl. Rep. 197.

The "Lloyds" insurance policies, which have had some little vogue for years past, and been vigorously denounced by the regular companies, have been recently passed upon by Judge Spring, of the Supreme Court of New York, at Trial Term for Erie County. He holds (1) That the stipulations in a Lloyds policy that no action to enforce its provisions shall be brought except against one of the underwriters, who is designated to represent all the others, and that they will abide by the result of that action, is valid, as its enforcement does not oust the jurisdiction of the courts, but only prevents a multiplicity of suits, and the action thus provided for is against one of the parties to the contract, and not a mere agent or attorney; (2) That such a stipulation precludes the bringing of separate actions on the policy against the several underwriters, but does not prevent proceeding against them to enforce a judgment obtained in the

Insurance.
What is not an
Insurance
Company

Lloyds Policy,
Validity.
Suits Upon

action prescribed; and (3) That a limitation in a Lloyds policy that action therein must be answered within twelve months after loss refers only to the action to establish the claim, not to proceedings against the various underwriters to enforce a judgment: *Lawrence v. Schaffer*, 42 N. Y. Suppl. 992.

In *Roberts v. Security Co., Ltd.*, [1897] 1 Q. B. 111, a proposal for an insurance of goods against loss by burglary was made by the plaintiff to the defendant company on December 14, 1895. On December 27, 1895, at a meeting of the directors of the company, the seal of the company was affixed to a policy in conformity with the proposal, and this policy was signed by two of the directors and their secretary. It recited that a premium had been paid for insurance against loss by burglary from December 14, 1895, to January 1, 1897, and purported to insure the plaintiff's goods accordingly; and also contained a provision that no insurance by way of renewal or otherwise should be held to have been effected until the premium due thereon should have been paid. Upon the night of December 26, or early in the morning of December 27, 1895, a loss of goods included in the policy took place by burglary. The policy remained in the hands of the company, and nothing was paid by way of premium. Under these circumstances the Court of Appeal ruled that the policy constituted a completed contract of insurance, that the condition for prepayment of the premium was waived by the defendants by the recital of its payment; and that the policy had therefore attached.

When a judge, after the jury has retired, goes to the door of the jury room at the request of that body, and returns and informs counsel that the jury, through its foreman, had requested a repetition of certain instructions, his acts constitute such misconduct as will justify a reversal of a conviction: *Scott v. Wright*, (Supreme Court of Washington.)

The Court of Appeals of Colorado has recently held, that when a tenant, during the term, and at his own expense, lays a tile floor in the demised building, he may, before the expiration of the term, remove the tiling, and restore the building to its original condition : *Ross v. Campbell*, 47 Pac. Rep. 465.

Landlord and
Tenant.
Fixtures.
Removal

The Supreme Court of Nebraska has very wisely cut loose from the stringent rule of *Paradine v. Jane*, Aleyn, 26, which has been more or less slavishly followed up to the present day by all the courts of English speaking countries, and declares, in accord with *Whitaker v. Hawley*, 25 Kans. 674, 1881, that "we reach the conclusion that the common law rule of construction under consideration is not in force in this state, and formulate the rule as follows : Where a substantial portion of leased premises is destroyed without the fault of the lessee, he is entitled to an apportionment of the rent covenanted to be paid and accruing thereafter, in the absence of an express assumption by him of the risk of such destruction : " *Wattles v. South Omaha Ice & Coal Co.*, 69 N. W. Rep. 785. Post, C. J., and Irvine and Ryan, CC., dissented.

Lease.
Covenant to
Repair.
Destruction of
Buildings by
Fire.
Apportion-
ment of Rent

A letter from an elector of a state to the governor, in reference to the character and qualifications of an applicant to the governor for appointment as sheriff of the county in which the said elector resides, is not an absolutely privileged publication, but is only qualifiedly or conditionally privileged. The publisher of such a letter cannot, under the guise of such a communication, falsely and maliciously traduce and slander the moral character of the applicant; and if he does so, he will be liable to an action therefor. But, on the other hand, the applicant cannot recover damages for any statements made in such publication, unless they were both false and malicious; and accordingly, though the alleged libelous matter cannot be shown by the publisher to be true, yet, if there was reasonable ground for him to suppose that it was

Libel,
Privileged
Communica-
tion.
Letter to
Governor

honest belief that it was true both in assertions of fact and in comment thereon, and was published with the motive of benefiting the public welfare, without any private personal malice towards the plaintiff, the publisher will not be liable in damages: *Coogler v. Rhodes*, (Supreme Court of Florida,) 21 So. Rep. 109.

The Supreme Court of New York, Appellate Division, Third Department, held, in a recent opinion, that the discharge on *habeas corpus* of a person committed to await the action of the grand jury is not such a termination of the criminal proceedings, as will ground an action for malicious prosecution; and

Malicious
Prosecution
Termination
of Proceedings

that the fact discharged on *habeas corpus* from a commitment to await the action of the grand jury, no further steps were taken in the criminal proceedings, does not show that those proceedings had been finally disposed of: *Hinds v. Parker*, 42 N. Y. Suppl. 955.

An employe of an electric light company, who is sent to trim lamps at a time when the wire connected with the lamps is usually "dead," and who knows that lamps are never trimmed while on "live" wires, has a right to assume that the wires will not become alive through the negligence of the company while he is engaged in trimming them: *Harroun v. Brush Electric Light Co.*, (Supreme Court of New York, Appellate Division, Fourth Department,) 42 N. Y. Suppl. 716.

Master
Servant
Electric
Wires
Assurance
Care
Negligence

In *Hitchcock v. Nixon*, (Supreme Court of Washington,) 47 Pac. Rep. 412, land on which there were two mortgages had been conveyed by the mortgagor to the first mortgagee, who also mortgaged it. At the time of the execution of the latter mortgage most, if not all of the debt secured by the first mortgage was paid, and the balance if any was paid afterwards. Under these circumstances, it was held that the doctrine of non-merger did not apply; and that the lien of the second mortgage was superior to that of the mortgage given by the grantee of the mortgagor.

Part
Mortgage
Priority

of the
debt

if any

was

that

of the

Vice-Chancellor Reed, of the Court of Chancery of New Jersey, has lately decided a very interesting question in regard to the jurisdiction of equity over the acts of municipal officers. The common council of the borough of Spring Lake, by resolution, threatened to tear down a building that was being erected on land claimed by the borough to have been dedicated to public use. A bill was filed to restrain the borough and its officers. The borough answered, setting up a dedication of the building site, and further filed a cross-bill upon the same ground, praying that the nuisance might be abated. The Vice-Chancellor held, in a carefully considered opinion, that though a court of equity will not, as a general rule, correct irregularities in municipal procedure, it will nevertheless restrain an irregular proceeding if it threatens irreparable injury; that as the charter of the borough prescribed that it should act by ordinance, the action by resolution was irregular; that the injury threatened was irreparable; that the nuisance was not such as a municipal officer could abate at common law, and that the acts threatened could therefore be restrained. But he also held, that as a municipality, as the representative of the public, may sue to abate or prevent a nuisance upon public property within its limits the court would retain the cause upon the allegations of the cross-bill, (no objection to the jurisdiction having been made until the evidence was concluded, and the dedication of the land appearing to be reasonably clear), and would decree an abatement of the nuisance: *Coast Co. v. Mayor, etc., of Borough of Spring Lake*, 36 Atl. Rep. 21.

The Supreme Court of Missouri has lately ruled, that the state board of health has no authority to refuse a certificate authorizing an applicant to practice medicine in the state, on the ground that the medical college from which he had graduated had not complied with a resolution of the board requiring every college, by a certain date, to furnish the board with a list of its matriculates and the basis of their matriculation, when it appears that the applicant

Municipal
Corporation.
Injunction
Against Acts
of Officers,
Abatement of
Nuisance

Physicians,
Refusal of
Board of
Health to
Grant Certifi-
cate of Admis-
sion to
Practice,
Mandamus

was graduated before the college received notice of the resolution; and that, though mandamus will not lie to compel the state board of health to issue a certificate to practice medicine, when they have determined that the applicant is not a graduate from a medical college "in good standing," the decision of that question being within their discretion, yet the question of good standing cannot be made to depend merely on whether the college has complied with a resolution of the board such as mentioned above, the statute giving them no such power; and that a mandamus will accordingly issue in such a case to compel the granting of the certificate: *State v. Lutz*, 38 S. W. Rep. 323.

Though in general the pledgor has an adequate remedy at law for the conversion of a pledge, yet, when the pledgee is insolvent, and the transferee of the pledge lives in another state, a bill in equity will lie at the suit of the pledgor to redeem the pledge: *Nelson v. Owen*, (Supreme Court of Alabama,) 21 So. Rep. 75.

The Supreme Court of the United States has recently held, that a suit in equity against the secretary of the interior to compel him to issue patents to certain lands abates upon his resignation from the office; that when such bill is filed against both the secretary and the commissioner of the general land office, but so far as the latter is concerned only seeks to enjoin the execution of the orders of the secretary relative to the disposition of certain lands, it cannot be maintained against the commissioner alone, after the suit has abated as to the secretary by his resignation; and that in such a case the bill cannot be amended by making the successor of the secretary a defendant: *Warner Valley Stock Co. v. Smith*, 17 Sup. Ct. Rep. 225.

According to a late decision of the Supreme Court of Washington, a city treasurer, who knowingly receives and appropriates to his own use interest on funds of the city deposited in bank, is guilty of a violation of a statute, (Penal Code Wash. § 57,) which makes it a felony for a public officer to use, in

Pledge,
Bill to
Redeem

Public
Officers,
Resignation,
Suit Against,
Abatement

Public
Officers,
Profit out of
Public Funds

any manner not authorized by law, money entrusted to his safekeeping, in order to make a profit therefrom, or to use the same for any purpose not authorized by law ; the commission of the offence denounced is proved by evidence that interest on the city's deposits in a certain bank was credited to the defendant's individual account, that he drew checks against the interest so credited, which were paid, and that these checks rapidly increased as the interest deposit grew larger ; and that the fact that the defendant does not cause the interest to be credited to his own account, or know that it had been so credited, is immaterial, if he afterwards appropriates the money, knowing that it is interest on the city's funds : *State v. Boggs*, 47 Pac. Rep. 417.

When an apparently helpless person is lying so near to the outer side of a rail as to be exposed to danger from a passing engine, and the engineer, by using ordinary care, could have seen him in time to stop the train with safety to those on board, before the engine struck him, the company is liable for the injury, notwithstanding the man's contributory negligence ; the duty of the engineer in such a case is the same as if the person endangered had lain between the rails : *Pharr v. Southern Ry. Co.*, (Supreme Court of North Carolina,) 26 S. E. Rep. 149.

Railroad
Companies,
Negligence,
Injury to
Persons on
Track

Ardemus Stewart.

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RECOVERY UPON ULTRA VIRES CONTRACTS. A very able opinion by the Court of Appeals of New York, per Chief Justice Andrews, deserves notice as an instructive addition to the development of the doctrines of corporate power: *Bath Gaslight Co. v. Claffy et al.*, 45 N. E. 390 (1896).

The Bath Gaslight Co., a Maine corporation, leased its gas-lighting plant, property and franchise to the United Gas and Fuel Co., also a Maine corporation, for the term of twenty-five years at an annual rent. Claffy became surety on a bond executed for the faithful performance of the covenants in the case. The lessee entered upon the property and operated the plant, but after paying two installments of rent defaulted on a third. The rent remaining unpaid, the lessor re-entered and took possession of the demised property, under a provision of the lease. The lessor then brought suit on the bond against the lessee and the sureties to recover as damages the rent which remained unpaid; Claffy alone appeared, and defended on the ground that the lease was *ultra vires*, illegal

and void, because made without legislative sanction. There was judgment for the lessor, Vann, J., dissenting in an elaborate opinion.

The Chief Justice reviewed the doctrines of corporate power and stated "the modern doctrine" to be "to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted and as not having others." He recognized that there are contracts which would be declared immoral and unenforceable in the case of an individual, and that there are also contracts in the case of corporations that are expressly prohibited. He conceded that neither of these classes of contracts should be enforced by the court in favor of the corporation or against it. While admitting that a corporation with public duties to perform may not lease or otherwise part with its property and franchises without legislative authority, he was nevertheless of opinion that if such a lease by such a corporation is in fact made, it is not "in any true sense of the word illegal," though it is undoubtedly void as against the state.

Under the American doctrine of special capacities as quoted, this lease was *ultra vires*, and on strict principle no suit could be maintained on the contract; nor could any action in quasi-contract be maintained against Claffy, a guarantor, for he had sustained no unjust enrichment. The Supreme Court of the United States and some state courts have refused to permit recovery on similar *ultra vires* contracts upon the ground that to permit recovery in such cases was in conflict with an alleged public policy. The New York Court founded the right of recovery in this case on public policy.

It is interesting to observe in the opinions filed here the two views of public policy taken by the courts which respectively permit and refuse recovery on *ultra vires* contracts. "Is there any public policy," asks the Chief Justice, "which requires that the lessee should be permitted to escape the obligation imposed by the contract to pay rent reserved during the enjoyment of the property."

"Public policy is promoted by the discouragement of fraud and the maintenance of the obligation of contracts." Vann, J., in dissenting, regarded the lease as opposed to public policy and therefore void, because "it was beyond the corporate powers of the lessor, and involved an abandonment of its duty to the public," citing *inter alia* the federal Supreme Court decisions holding this view.

It seems to us, however, that a complete answer to the latter position is found in the opinion of the Chief Justice: "But the law affords ample public remedy for the usurpation by the corporation of unauthorized power, through proceedings by injunction or for the forfeiture of their charters."

The opinion is interesting in another particular; it illustrates the difficulty experienced by Courts in attempting to justify a

decision upon principles of law which are in fact abandoned by the decision itself. In reaching the sound result represented by the decision of the Court, it is to be regretted that Chief Justice Andrews did not emphasize the impossibility of reaching such a conclusion upon any other theory of corporate power than the common law theory of general capacities, not indeed as the theory is applied in England, but in the sense that all such contracts, whether executory or executed, will be enforced between the parties. From the premises of the Chief Justice, it is hard to escape the conclusion that no contract had come into existence in this case on account of the lack of contractual power upon the part of the lessee. But had the court boldly asserted its adherence to the doctrine of general capacities—that a corporation has all the powers of a natural person, but is restrained in the exercise of many of them by the terms of its charter and the nature of its business—it could have decided with unanswerable logic that the plaintiff in the case at bar had indeed become a party to a contract which it could enforce against the defendant, but that as respects the State it had violated a provision in its charter for the breach of which the State might make it answerable.

CARRIERS OF PASSENGERS BY STEAMBOATS—LIABILITY OF INNKEEPERS. In the recent case of *Adams v. New Jersey Steamboat Co.*, 45 N. E. Rep. 369, the Court of Appeals of New York has decided that a carrier of passengers by steamboat is liable as an innkeeper, where money for travelling expenses is stolen from a passenger's state-room at night, and without proof of the carrier's negligence.

The Court, per O'Brien, J., said that "the traveller who pays for his passage and engages a room on one of the modern floating palaces that cross the sea or navigate the interior waters of the country, establishes legal relations with the carrier that cannot well be distinguished from those that exist between the hotel keeper and his guests." The case is decided simply on this broad ground. No authority is cited to uphold the court's position, nor are the cases holding differently referred to by it.

This case, it seems, is in conflict with the established rule, laid down by the authorities, that carrier's are not liable as innkeepers. The general rule as may be gathered from the decisions is, that where the property is taken from a state-room or stolen from the pocket of a passenger, in the absence of proof that the robbery was committed by one of the employees, the shipowner will not be liable: *Clark v. Burns*, 118 Mass. 275; *The R. E. Lee*, 2 Abb. (U. S.) 49; *Abbott v. Bradstreet*, 55 Me. 530; *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. (Ky.) 302; *McKee v. Owen*, 15 (Mich.) 115.

INSURANCE. It seems to be fairly well settled that where an insurance company issues a policy containing a condition, and at

the same time has knowledge of facts which will vitiate the policy if the condition be insisted on, in such case the company cannot take refuge behind the stipulation and prevent the insured from recovering on the policy. This rule was recognized in the recent case of *Graham v. American Fire Ins. Co.*, 26 S. E. Rep. 323. The plaintiff had taken out a policy of insurance with the defendant company on certain stock in a hosiery mill—loss payable to one Tilton as his interest may appear—and the policy provided that the insurance should be void if the assured was not the sole and unconditional owner of the property. It appeared that the plaintiff was manager of this mill for Tilton, who was the real owner, under a twenty years' contract, and that this fact was made known to the agent of the insurance company before the policy was issued. The property having been destroyed by fire, and suit being brought on the policy, the insurance company contended that parol evidence was not admissible to show that it knew of the plaintiff's title at the time it assumed the risk. The court, however, admitted the evidence, saying that such knowledge amounted to a waiver by the insurance company of the condition in the policy.

This rule seems sound and in accordance with the weight of authority, and is based on the reason that to allow the company in such a case to insist on the condition would be to perpetuate a fraud, for the company would thereby be enabled to issue a policy and receive premiums thereon when it knew that the insured could not recover in case of loss: *Van Schoick v. Fire Ins. Co.*, 68 N. Y. 434; *Casey v. Ins. Co.*, 66 N. W. 920; *Ins. Co. v. Johnson*, 45 P. 789; *Ins. Co. v. Brown*, 44 P. 35; *Ins. Co. v. Kline*, 32 S. W. 214; *Ins. Co. v. Ward*, 26 S. W. 763; *Robbins v. Ins. Co.*, 29 N. Y. Suppl. 513.

It would seem, however, that since waiver is a voluntary relinquishment of a known existing right, the court is not strictly accurate when it says that the Insurance Company waived the condition. For when the contract was formed the insurer has no rights against the insured. Such rights as it has are acquired under the contract. How, then, can it be said that there is any waiver of a right by the same act by which that right is created? To say so would involve just as much of a contradiction as to allow the defense contended for by the Insurance Company in the above case. The true view in such a case would appear to be that there has been a mistake; that this policy before the court does not express the real intention of the parties and therefore parol evidence is admissible, as Mr. Justice Miller says in *Insurance Co. v. Wilkinson*, 13 Wallace 222, not to contradict the contract, but to show that it may not be lawfully used against the party whose name is signed to it.

LEASE—COVENANT TO REPAIR—DESTRUCTION OF BUILDINGS BY FIRE. *Wattles v. So. Omaha Ice and Coal Company*, Supreme Court of Nebraska, 69 N. W. 785. The growing tendency exhibited of late by our courts to administer natural justice between

suitors and to arrive at conclusions based on principles of honesty and morality finds excellent illustration in the above case. The facts were briefly as follows: In November, 1894, the defendant had leased certain ice houses belonging to the plaintiff and situate along the river front. He covenanted to keep the leased premises in good repair, and at the end of the term to surrender their possession in as good condition as they were when he entered, natural decay, wear and tear alone excepted. During the term the buildings were destroyed and rendered entirely valueless by a "violent wind storm or hurricane." The lessor claimed that the above provisions of the lease amounted to a covenant to restore the buildings. In passing on this case the Supreme Court of Nebraska reviews the authorities very carefully and the decision may be taken as a fair index to the trend of judicial opinion on this mooted point.

In 1 *Taylor on Land. and Ten.*, 8 Ed. 357, the rule is stated as follows: "Where a tenant is under an express covenant to repair premises he is liable for any loss or damage they may sustain and must even rebuild in case of casualty by fire or otherwise." In 12 *Am. & Eng. Enc. Law*, 721, the rule is thus stated: "The alterations in the tenant's liability for repairs, produced by his executing a lease in which he makes an express covenant to repair, is so marked that he becomes liable for all losses and damage the premises may sustain, and must even rebuild in case of casualty by fire or otherwise." In *Phillips v. Stevens*, 16 Mass. 238 (1819), the lessee covenanted "that he would keep in repair, support and maintain . . . the fences and building, saving and excepting the natural decay of the same, as should be needful, at his own proper cost and charge, and at the end of the term, . . . would quietly surrender, leave and yield up, the premises in the same condition" they were at the date of his lease. The buildings on the leased premises were destroyed by fire, without the fault of the lessee and the Supreme Court of Massachusetts, in construing the covenant in the lease, held it was a contract binding the covenantor to restore the burned buildings. The same conclusion on precisely similar states of facts was reached in the following cases, all of which seem to recognize the authority of *Phillips v. Stevens*: *Beach v. Crane*, 2 N. Y. 87; *Polack v. Pioche*, 35 Cal. 416; *Ely v. Ely*, 80 Ill. 532; *Davis v. Ryan*, 47 Iowa, 642.

In the case under consideration the court said that the decision in *Phillips v. Stevens*, relied upon by the courts in New York, California, Illinois and Iowa, seems to be based on the principle that when once a man "has by his own contract . . . created a duty or charge upon himself he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it in his contract." "This principle," says the court, in what seems to be a perfectly just criticism, "is at best, only a rule of construction; at all times the intention of the parties should govern." "Repair," says the court, "means to restore an existing thing. Were the construction contended for in this case

correct; had this entire tract of lands and buildings been swept away by a flood of the Missouri River the lessee would be liable for their value." (This was substantially the state of facts in *Waite et al. v. O'Neill et al.*, 76 Fed. 40 (1896), in which it was decided that the lessee was not liable.) "Before we impose any such risk on him, we must first find his assumption of it in clear and unmistakable language." The following are some of the authorities supporting the court's position: In the case of *Pollard v. Schaffer*, 1 Dall. (Pa.) 210, the defendant had covenanted to keep the demised premises in good repair, and in excuse for not so doing pleaded that an alien enemy, to wit, the British army had invaded the city of Philadelphia, and committed the damage complained of. The court, in deciding that he was not liable for repairs, said, "A covenant to do this against the act of God or of the public enemy ought to be so clear and express that no other meaning could be put upon it." See also *Levi v. Deyers*, 51 Miss. 501; *Warren v. Wagner*, 75 Ala. 188; *Howeth v. Anderson*, 25 Tex. 557; *Warner v. Hitchins*, 5 Bush; *Wainscot v. Silvers*, 13 Ind. 497.

These cases all seem to point to the one conclusion, viz., that in order to bind a lessee to restore building destroyed by casualty beyond his control, a mere covenant in general terms to repair, or to return the premises in as good condition as they were at the beginning of the term, is not sufficient. There must be an actual covenant in express terms to that effect. If we admit, as we must, that the intention of the parties should be the controlling element in determining their liabilities towards each other, this conclusion seems a just one, because it cannot be reasonably supposed that there was at the execution of the lease, any intention that the lessee should be bound, in case of damages arising without his fault, through casualty, inevitable accident, or the act of God.

ORPHANS' COURT SALE—JURISDICTION—COLLATERAL ATTACK.
Reese v. Wildman, 35 Atl. 1047; 39 W. N. C. 193. Supreme Court of Pennsylvania.

The above decision unsettles, to a great degree, the conclusiveness, in other courts, of an Orphans' Court decree of sale of decedent's lands for the payment of debts.

The facts were that one S. died in 1862 seized of a farm, and leaving heirs. A sister had lent him \$500, which he had used in purchasing said farm. For this money he gave no security. At S.'s death such of the children, as were of age, made some arrangement with their aunt by which she took the farm in payment of her death. When she came to sell it, the purchaser objected to the title as two of the children were still minors and their title outstanding. To remedy this defect, an administrator was appointed in 1872, who applied for leave to sell, for payment of the debt of \$500. The debt had been meantime barred by the statute of limitations and by operation of the Act of 1834, February 24th. Without inquiry as to the time of S.'s death or of the creation of

the debt, the Orphans' Court ordered a sale and confirmed the same. The plaintiffs now claim in ejectment by descent and by operation of the Act of 1834. The defendants reply by asserting the conclusiveness of the Orphans' Court's decree.

The court held that the sale might be thus impeached in the Common Pleas many years after it had been made. The ground of the decision was that, as the Orphans' Court has only power to sell land for the payment of debts, and, as, in this case, there were no debts, there was nothing which could give the court jurisdiction of the case. In other words, the court took the view that the existence or non-existence of debts instead and not the existence or non-existence of debts *as found by the Orphans' Court*, was a jurisdictional fact.

This decision, as is pointed out in an able article by Judge Penrose of the Orphans' Court of Philadelphia, in 53 *Legal Intelligencer*, 483, assumes that debts cease, as a matter of law and absolutely, to be a lien after five years. The lien is not, however, so limited. The Act of 1834, February 24th provides:

Sect. 24. "No debts of a decedent except they be secured by mortgage or judgment, shall remain a lien on the real estate of such decedent longer than five years after the decease of such debtor, unless an action for the recovery thereof be commenced and duly prosecuted . . . within five years after his decease, or a copy or written statement be filed with the prothonotary, etc. . . ."

The language of the act makes it clear that the question whether a lien exists is one of fact, not of law; and to the Orphans' Court is given exclusive jurisdiction to find that fact. It is the duty of the court to determine whether there be debts, in a given case, and further, whether such debts can be satisfied out of the personality, and whether they are a lien on the realty proposed to be sold.

It is clear that if the court has not jurisdiction to determine these matters, it cannot order a sale. Further, to give the court jurisdiction, it is not necessary that a schedule of debts be made a part of the petition for sale; the only requirement is that such a schedule should be exhibited: *Stirer's App.*, 56 Pa. 9, (1867).

Though the petition to the Orphans' Court in this case did not include all the facts, yet this amounts merely to an irregularity, which, as has often been held, would be cured by final decree: *Potts v. Wright*, 82 Pa. 498, (1876); *Shoenberger's Est.*, 139 Pa. 132, (1890); *Gilmore v. Rodgers*, 41 Pa. 120, (1861).

It is apparent from what has been said above that the existence of a lien is as much a question of fact as the existence of the debts themselves. If, then, there was an error in the Orphans' Court through insufficiency of evidence, the only remedy was by opening the decree by bill of review, or by appeal. Until the successful termination of such action the decree was entitled to the respect of other courts and could not be impeached collaterally.

Since the proceeding in this case was in accordance with the provisions of the law, as was said by Chief Justice Sterrett in his

strong dissenting opinion, "the maxim '*omnia præsumuntur rite esse acta, donec probetur in contrarium*'" applied, "and nothing but want of jurisdiction, apparent on the face of the record, or fraud, is recognized as a basis of question:" *McPherson v. Cunniff*, 11 S. & R. 422, (1824). All of the cases relied on by the majority of the court seem to come within this rule: *Grier's App.*, 101 Pa. 412, (1882); *Torrance v. Torrance*, 53 Pa. 505, (1866).

The decision certainly casts doubt on the rule as to collateral attack on Orphans' Court sales, and, as the dissenting judges say, will "seriously cripple an important branch of Orphans' Court jurisdiction, unsettle many titles, bought for value in good faith, and bring a flood of litigation."

EXCESSIVE DAMAGES. The case of *Smith v. Times Publishing Co. et al.*, 178 Pa. 481 (decided Jan. 4, 1897), was the occasion of the first exercise by the Supreme Court of Pennsylvania of the authority vested in it by the Act of May 20, 1891, Sec. 2, to "order a verdict and judgment set aside, and a new trial had." The plaintiff had obtained a verdict of \$45,000 in an action of trespass for an alleged libel published in the *Times*, and on a refusal to grant a rule for a new trial, the defendants had appealed assigning for error, *inter alia*, that the verdict was excessive. The judges were unanimous for reversal but differed considerably in their views.

Mr. Justice Mitchell rested the right of the Supreme Court to review the action of the jury directly upon the above mentioned Act, and as it was attacked as being in violation of the provision of the constitution of Pennsylvania, that "trial by jury shall be as heretofore and the right thereof remain inviolate," he examined the jury system to determine what are its essential features. He decided that "the Act of 1891 makes no change in the trial itself, nor does it deny the right. All that it does is to provide for another step between verdict and final judgment, of exactly the same nature and the same effect as the long-established power of the lower courts. The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. . . . The Act of 1891 vests a further power of revision, of the same nature, in this court. . . . It is a power of review only, before final judgment, and does not violate the right to a jury trial or even interfere with it in the particular case more than was or might have been done by the court below."

Mr. Justice Williams also reviewed the history of trial by jury and came to the conclusion that the appellate court as well as the trial court possessed the power of setting aside an erroneous verdict. He said that this method of granting a new trial had superseded the more summary process by way of fine and imprisonment of the jury, which itself was the successor of a direct proceed-

ings against the members of the jury to attain them for their false verdict. "The exercise of this power was then thought to be in aid of trial by jury." "This practice, with which the colonies were familiar, has continued in the courts of the states and of the United States in some form down to the present time and is as indispensable to the proper administration of justice now as it was in the days of Lord Mansfield." His Honor then stated that the tendency of modern times had been to restrict the exercise of this power of review on the part of the Supreme Court to cases where it was alleged that the trial court had abused its discretion as to granting or refusing a new trial, and it would not exercise this right upon an appeal without such allegation; that as suitors were disinclined to allege such abuse on the part of the trial court, this power was not often invoked, but that "the Legislature of this state seems to have been of the opinion that the power of revising the exercise of discretion is not only constitutional but desirable." He further said that "in the Supreme Court of the United States the power of an appellate court to reverse and order a new trial for excessive damages is recognized." In support of this position he cited *Kenyon v. Gilmer*, 131 U. S. 22 (1888); *Hopkins v. Orr*, 124 U. S. 510 (1887); *Arkansas Cattle Co. v. Mann*, 130 U. S. 69 (1888). A careful examination of these cases will, it is believed, show that they do not sustain this statement. In *Kenyon v. Gilmer*, 131 U. S. 22 (1888), the only question before the court was whether the Supreme Court of the territory of Montana acted correctly in ordering a judgment to be reduced by almost one half and then affirming it for that amount. Mr. Justice Gray said that the Seventh Amendment of the Constitution of the United States was in force in the territory; that in accordance therewith the Code of Civil Procedure of Montana provides that "an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered by consent of the parties;" and that that code authorized the court in which a trial is had, or the Supreme Court of the territory on appeal, to set aside a verdict and grant a new trial "for excessive damages appearing to have been given under the influence of passion or prejudice." He then expressed himself as follows: "Under these statutes, as at common law, the court, upon the hearing of a motion for a new trial, may, in the exercise of its judicial discretion, either absolutely deny the motion, or grant a new trial generally, or it may order that a new trial be had unless the plaintiff elects to remit a certain part of the verdict, and that, if he does so remit, judgment be entered for the rest: *Hopkins v. Orr*, 124 U. S. 510; *Arkansas Cattle Co. v. Mann*, 130 U. S. 69."

This statement as to the powers which the court of the Territory might exercise under the Code was clearly *obiter dictum*, and further, the cases which the learned Justice cites in support of his views are not at all in point. *Hopkins v. Orr*, *supra*, decided that the Supreme Court of New Mexico was authorized to affirm the

judgment rendered by the District Court upon the general verdict for the plaintiffs, and to make its affirmance conditional upon the plaintiffs' remitting part of the interest awarded below, since it appeared from the record that the computation of interest had been usurious. *Arkansas Cattle Co. v. Mann*, *supra*, decided that if the trial court makes the decision of a motion for a new trial depend upon a remission of the larger part of the verdict, this is not a re-examination by the court of facts tried by the jury in a mode not known at the common law; and is not a violation of the Seventh Amendment.

Since the Seventh Amendment is in force in the Territories, their statutes would be pronounced unconstitutional if they really purported to confer the power on their appellate courts which they are said to do in the *obiter* remarks of Mr. Justice Gray, quoted *supra*, for the federal Supreme Court has always consistently declined to exercise the power to re-examine the findings of the jury as opposed to the Seventh Amendment: see *Parsons v. Bedford*, 3 Pet. 433 (1830); *The Justices v. Murray*, 9 Wall. 274 (1869); *Insurance Co. v. Comstock*, 16 Wall. 258 (1872); *R. R. Co. v. Fratloff*, 100 U. S. 24 (1879); *Wabash R. R. Co. v. McDaniels*, 107 U. S. 454 (1882); *Wilson v. Everett*, 139 U. S. 616 (1890); *Etna Life Ins. Co. v. Ward*, 140 U. S. 76 (1890); *Erie R. R. Co. v. Winter*, 143 U. S. 60 (1891). Those statutes are open, however, to a narrower construction, namely, that they only declare the power of the appellate court to reverse or modify the judgment of the lower court for errors appearing on the record. Mr. Justice Williams evidently considered the *obiter dictum* of Mr. Justice Gray to be the decision of the court in *Kennon v. Gilmer*, *supra*, and then followed the learned federal judge in citing the two cases relied on by him.

The narrower construction of the acts of the Territories, suggested above, was applied by Mr. Justice Sterrett to the Pennsylvania Act of 1891. He thought that the Supreme Court had never had the power to re-examine findings of fact, and that the Legislature had indicated no intention in the Act of 1891 to confer it. He considered the Act merely declaratory of powers that could have been exercised without it, and, therefore, entirely constitutional. He was in favor of reversing on the ground that there had been a manifest abuse of discretion on the part of the court below.

Mr. Justice Dean was thoroughly opposed to tampering with the verdict of the jury. He urged the objection that an appellate court is not in a position to tell what the jury should have done since, unlike the trial court, it has not heard the testimony upon which the verdict is founded. He thought that at common law the power of revision of verdicts had been confined to the trial court, and was only rarely exercised, while in Pennsylvania it had never been claimed or used by the Supreme Court. In support of the latter part of that statement he cited the following cases: *Ross v. Rittenhouse*, 2 Dallas, 160 (1792); *Moser v. Mayberry*,

7 Watts, 12 (1838); *Gaskell v. Morris*, 7 W. & S. 32 (1844); *Hamel v. Dundass*, 4 Pa. 178 (1846); *Faunce v. Leslie*, 6 Pa. 121 (1847); *Pa. R. R. Co. v. Allen*, 53 Pa. 276 (1866); *Pa. R. R. Co. v. Goodman*, 62 Pa. 329 (1869); *Gray v. Commonwealth*, 101 Pa. 380 (1882); *R. R. Co. v. Spinker*, 105 Pa. 142 (1884); *McKenney v. Fawcett*, 138 Pa. 344 (1890).

In the face of this line of authorities it would seem difficult to escape the conclusion that it was the settled opinion of the court, prior to 1891, that it did not have the power now in dispute. The learned Justice then said that when there have been several constitutions in a state, the nature and extent of the right of trial by jury must be determined by the practice before the last one, and he referred to *Byers & Davis v. Com.*, 42 Pa. 89 (1862); *Wynehamer v. The People*, 13 N. Y. 378 (1856); *Triggally v. Mayor*, 6 Cold. (Tenn.) 382 (1869). If, then, this be the meaning of the words "trial by jury shall be as heretofore," and the Act of 1891 be construed to give this power to the Supreme Court, which is prohibited by the constitution, Mr. Justice Dean has made out a strong case against the statute. But, in the first place, it can be contended that the provision in the present constitution referred back to the state of things existing in England before any of the Pennsylvania constitutions were adopted, and the fact that the language of the constitution of 1776 was "trials by jury shall be as heretofore" and that of the constitutions of 1790 and 1838 was identical with that in the present constitution, lends plausibility, to say the least, to the argument. If this position be admitted it becomes important to find out what was the rule at common law, and on this point Story, J., says in *Parsons v. Bedford*, 3 Pet. 433 (1830): "The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings." See, also, Miller, Constitutional Law, 495, and cases cited. In the second place, there remains the narrower construction of the Act, already referred to, and towards which Mr. Justice Dean himself inclined, by which the Act is regarded as merely declaratory and, therefore, constitutional.

In the following states there are statutory provisions similar to the Pennsylvania Act of 1891: Wisconsin, Minnesota, Missouri, Kansas, Arkansas, Indiana, Nebraska, Iowa; and their courts have all exercised without comment or discussion the power of revision conferred on them,—see: *Waterman v. Chicago & Alton R. R.*, 82 Wis. 613 (1892); *Gunderson v. Northwestern Elevator Co.*, 47 Minn. 161 (1891); *Haynes v. Trenton*, 108 Mo. 123 (1891); *Upcher v. Oberlander*, 50 Kan. 315 (1893); *Fordyce v. Jackson*, 56 Ark. 594 (1892); *R. R. Co. v. Spontier*, 85 Ind. 165 (1882); *Orleans Village v. Perry*, 24 Neb. 831 (1888); *Cooper v. Mills Co.*, 69 Iowa, 35 (1886).

It remains to be noted that the provision of the Seventh Amendment that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law" lays stress on the findings of the jury, while the provision of the Pennsylvania constitution only preserves the institution of trial by jury and the right to it; there is thus great force in the position of Mr. Justice Mitchell, *supra*. It need hardly be added that the Seventh Amendment *only* applies to courts of the United States so that the states can adopt any provisions that they see fit in regard to trial by jury in civil cases.

In view of this difference of opinion between the courts of the states and of the United States, it will probably be thought that the Supreme Court of Pennsylvania has assumed and exercised a dangerous power, and that Mr. Justice Dean was justified in recalling the familiar maxim that "Hard cases make bad precedents."

INVOLUNTARY SERVITUDE. Certain individuals signed shipping articles to perform the duties of seamen during the course of a specified voyage, but becoming dissatisfied with their employment, left the vessel. They were arrested under R. S. secs. 4596 to 4599, and committed to jail until the ship sailed (some sixteen days); being returned to the ship, and refusing to "turn to" in obedience to master's orders, they were again arrested at San Francisco for refusing to work in violation of R. S. sec. 4596, and were held to answer such a charge before the District Court for N. D. of California. A writ of *habeas corpus* was sued out and dismissed. On appeal, the Supreme Court of the United States affirmed the decision: *Robertson, et al v. Baldwin*, 1897 (not yet reported).

Mr. Justice Harlan filed a dissenting opinion, taking the ground that the statutes under which the petitioners were detained conflicted with the constitutional inhibition upon involuntary servitude.

The majority of the court by Mr. Justice Brown suggested two grounds for their conclusion: first, "Does the epithet 'involuntary' attach to the word 'servitude' continuously, and make illegal any service which becomes involuntary at any time during its existence; or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into?" The court adopts the latter view. The second ground is that "If the contract of a seaman could be considered within the letter of the Thirteenth Amendment, it is not, within its spirit, a case of involuntary servitude."

Mr. Justice Brown reviews the law relating to seamen from the time of the ancient Rhodians, and concludes that "in the face of this legislation upon the subject of desertion and absence without leave, which was in force in this country for more than sixty years before the Thirteenth Amendment was adopted, and similar legislation abroad from time immemorial, it cannot be open to doubt that the provision against involuntary servitude was never intended to apply to their contracts." It is clear that this falls within a

well known rule of construction. The language of the Thirteenth Amendment was derived from the 6th Article of the Northwest Ordinance of 1787; the Act of 1790, under a re-enactment of which these seamen were imprisoned, applied to the Northwest territory, and it cannot be supposed that these statutes were deemed inconsistent. The term involuntary servitude meant "such as would not be tolerated by the free principles of the common law," (Cooley Const. Lim. 227), and became a part of the constitution when the term had a definite meaning in American jurisprudence, and when the obligations of seamen were well defined; it is too late then to attempt to bring within its purview cases which were regarded as distinct exceptions by those who framed the amendment.

Despite the dissenting opinion, it is clear that the court might have rested its decision upon either of the foregoing propositions. The dissenting justice objected to the first proposition on the ground that service became involuntary "*from the moment (one) is compelled against his will to continue in such service*;" he calls the second proposition a piece of judicial legislation. As to his first objection, it seems to overlook the fact that a contract of personal service knowingly and willingly entered into cannot be deemed involuntary; nor can judicial legislation be said to result from the only construction which without doubt was in the mind of the framers of the Amendment. For both sides of the first proposition see case of *Mary Clark*, 1 Blackf. (Ind.) 122 (1821), and *State v. Williams*, 10 S. E. (S. C.), 876 (1890).

BOOK REVIEWS.

MORTUARY LAW. By **SIDNEY PERLEV**, of the Massachusetts Bar.
Boston: George B. Reed. 1896.

In legal literature the end of making many books seems much further in the future than the exhaustion of new subjects for literary effort. Mr. Perlev, by filling a two hundred and twenty page volume with the exposition of a branch of the law to which no other legal work has been exclusively devoted, has surely performed a noteworthy act. "The law concerning dead human bodies" begins with the last sickness and carries the reader through the records of deaths and burials, the property, custody, transportation, exhumation, and disposition of dead bodies, funerals, grave-stones, and the somewhat bulky law relating to cemeteries. The author has treated the subject exhaustively and has cited nearly four hundred cases, most of which are American decisions. Owing to the large amount of money expended each year for funerals and burial places, and as the questions arising in regard to dead bodies must be determined quickly, it seems that this volume, dealing with these questions, should be both convenient and valuable to the practicing attorney. The author may perhaps be justly criticized for too diffuse a style and for sometimes wandering from the technical legal path into the fields of poetry and legend.

F. S. M.

A PRACTICAL TREATISE ON THE LAW OF RECEIVERS, with extended consideration of Receivers of Corporations. By **CHARLES FISK BEACH, JR.**, of the New York Bar. Second Edition, with elaborate additions, etc. By **WILLIAM A. ALDERSON**, of the St. Louis Bar. New York: Baker, Voorhis & Co. 1897.

The frequency with which courts of equity have been petitioned in recent years to exercise their preventive jurisdiction has rendered the subject of receivers and receiverships of great importance. It is natural that the text-book makers should keep pace with this development, and the present volume is an excellent illustration of the fact.

Nine years have elapsed since the first edition was published. In speaking of his labor, the editor of this edition says: "I have not been satisfied to merely present the decisions of the various courts, but upon questions as to which courts have disagreed, and concerning many propositions not yet adjudicated, I have indulged in discussion and the expression of my own views." Perhaps the practice of making extensive quotations from reported opinions, which constitutes a large part of the editor's discussions, may be ques-

tioned; probably a statement of the principle underlying the decisions, or of their apparent trend, would be preferable, and the work would not be less interesting if more attention had been given to the editor's style and to the rules of syntax.

The treatment of the general subject is logical and complete. Succeeding an introductory chapter on receivers generally and on the nature of a receivership, appear chapters on the jurisdiction of courts and on conflicts between courts in the appointment of receivers. Eligibility, the principles of and the proceedings to obtain receivers, and appeals in such proceedings, are next treated. After discussing the receiver's bond, the effect of his appointment, his rights and powers, his duties and liabilities, the author continues with chapters on receivers of railroad corporations, receivers' certificates, receivers of corporations other than railroad, including national banks, of real property, of mortgaged property, of partnership property, of trust property, and in judgment creditors' actions, etc. He next treats of suits by and against receivers, of sales by receivers, injunctions, receivers' accounts and compensation, their removal, substitution and discharge, and concludes with a chapter recapitulating the general principles of the entire work.

The editor has considerably increased the size of the volume, and seems to have produced a practical treatise in which the most recent authorities may be found. He occasionally designates the judges of the United States Circuit Court by the letters C. J. These letters have so universally been regarded as an abbreviation of Chief Justice, that the innovation may prove confusing. The Table of Contents and the Index are especially complete. *W. B. L.*

BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked * will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.]

TREATISES.

COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, HISTORICAL AND JURIDICAL. By ROGER FOSTER. Three Volumes. Vol. I. Boston: The Boston Book Co. 1895.

AMERICAN RAILROAD AND CORPORATION REPORTS. Edited by JOHN LEWIS. Vol. XII. Chicago: E. B. Myers & Co. 1896.

THE ELEMENTS OF JURISPRUDENCE. By THOMAS ERSKINE HOLLAND, D.C.L. Eighth Edition. Revised. New York: The MacMillan Co. 1896.

A TREATISE ON MECHANICS' LIENS. By LOUIS BOISOT, JR., A.B., LL.B., of the Chicago Bar. St. Paul: West Publishing Co. 1897.

A TREATISE ON THE LAW OF FIRE INSURANCE. By D. OSTRANDER. Second Edition; revised and enlarged. St. Paul, Minn.: West Publishing Co. 1897.

A PRACTICAL TREATISE ON THE LAW OF RECEIVERS, with extended consideration of Receivers of Corporations. By CHARLES FISK BRACH, JR., of the New York Bar. Second Edition, with elaborate additions, etc. By WILLIAM A. ALDERSON, of the St. Louis Bar. New York: Baker, Voorhis & Co. 1897.

ANOMALIES AND CURIOSITIES OF MEDICINE. By GEORGE M. GOULD, A.M., M.D., and WALTER L. FYLE, A.M., M.D. Philadelphia: W. B. Saunders. 1897.

HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS. By WILLIAM L. CLARK, JR., Instructor in Law in the Catholic University of America, etc. St. Paul, Minn.: West Publishing Co. 1897.

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No. 4.

CAN A MURDERER ACQUIRE TITLE BY HIS CRIME AND KEEP IT?

"It is idle to say that the distinction between legal and equitable actions has been wiped out by the modern practice. It is true that all actions must be commenced in the same way . . . and that both kinds of action are triable in the same courts. But the distinction between legal and equitable actions is as fundamental as that between actions *ex contractu* and *ex delicto*, and no legislative fiat can wipe it out."

This statement of Mr. Justice Earl¹ as to the effect of the modern codes of procedure is supported by many similar observations by other judges,² and its truth will hardly be questioned by any thoughtful lawyer. The codes have, however, wrought many changes in the old terminology, and have broken away from certain traditions, which served as a constant reminder of the distinction between law and equity. One who seeks equitable relief no longer begins a suit in equity, but an action, and, if successful, obtains not a decree but a judgment. The bill in equity and the declaration at

¹ *Gould v. Cayuga Bank*, 86 N. Y. 75, 83.

² See, for example, *De Witt v. Hays*, 2 Cal. 463, 469; *Reubens v. Joel*, 13 N. Y. 488, 493; *Matthews v. McPherson*, 65 N. Ca. 189, 191; *Kahn v. Old Telegraph Co.*, 2 Utah, 174, 194; *Bonesteel v. Bonesteel*, 29 Wis. 245, 250.

law have both been replaced by the complaint, or, in some States, the petition. The defendant's pleading is never a plea, but an answer, regardless of the relief sought by the complainant. There are no more chancellors and common law judges; courts of equity and common law courts have disappeared, and there is no further issue of common law reports and chancery reports. In their stead we have simply judges, courts of law and law reports. These changes are commonly thought to have been beneficial. But with the disappearance of the old, every-day terms, which constantly suggested the difference between law and equity, there is danger that the distinction itself may be undervalued or overlooked. In truth, just because of this danger, it is even more important now than it was formerly to emphasize the true significance of the essential and permanent difference between legal and equitable relief. For the distinction between a judgment that the plaintiff recover land, chattels or money, and a judgment that the defendant do or refrain from doing a certain thing, is as vital and far-reaching as ever. In other words, the courts still act sometimes *in rem*, as at common law, and sometimes *in personam*, as in equity.

An excellent illustration of the importance of discriminating between relief *in rem* and relief *in personam* is to be found in the arguments of counsel and the opinions of the judges in dealing with several recent cases, in which one person killed another in order to acquire, by descent or devise, the property of his victim. By a strange chance there have been seven of these cases reported in the last nine years. In four of them the murderer was successful in securing and holding the property; in two others his purpose was defeated, as it would have been in the remaining case, if the complaint had been properly drawn. But in all the cases, with one exception, even in those in which the right result is reached, the reasoning is in the highest degree unsatisfactory.

There are three possible views as to the legal effect of the order upon the title to the property of the deceased:

1. The legal title does not pass to the murderer as heir or issue.

2. The legal title passes to the murderer, and he may retain it in spite of his crime.

3. The legal title passes to the murderer, but equity will treat him as a constructive trustee of the title because of the unconscionable mode of its acquisition, and compel him to convey it to the heirs of the deceased, exclusive of the murderer.

Each of these views has been adopted in one or more of the cases. The first view was made the *ratio decidendi* in *Riggs v. Palmer*¹ (1889), in *Shellenberger v. Ransom*² (1891), and in *McKinnon v. Lundy*³ (1893-1895). In *Riggs v. Palmer* a lad of sixteen killed his grandfather to prevent the latter from revoking a will in which he was the principal devisee. The words of the New York Statute of Wills are. "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered otherwise," etc. And there is no mention in the statute of the case of the murder of the testator by a beneficiary under the will. In *Shellenberger v. Ransom*, a father murdered his daughter that he might inherit her lands, and, being arrested, conveyed his interest in the lands to his attorney to secure his services in defending him. By the Nebraska Statute of Descents: "When any person shall die seized of lands . . . they shall descend in the manner following . . . second . . . if he shall have no issue or widow his estate shall descend to his father."

It seems impossible to justify the reasoning of the court in these cases. In the case of the devise, if the legal title did not pass to the devisee, it must be because the testator's will was revoked by the crime of his grandson. But when the Legislature has enacted that no will shall be revoked except in certain specified modes, by what right can the court declare a will revoked by some other mode? In the case of inheritance, surely, the court cannot lawfully say that the title does not descend, when the statute, the supreme law, says that it shall descend. It is not surprising, therefore, to find that both the New York and the Nebraska courts have abandoned their untenable position.

¹ 115 N. Y. 306.

² 31 Neb. 61.

³ 24 Ont. R. 132; 21 Ont. Ap. 560; 24 Can. S. C. R. 690.

In *Ellerson v. Westcott*,¹ (1896), it was said that *Riggs v. Palmer* must not be interpreted as deciding that the grandfather's will was revoked. On the contrary, the devise took effect and transferred the legal title to the grandson. But the court, acting as a court of equity, compelled the criminal to surrender his ill-gotten title to the other heirs of the deceased. In other words, the third of the three views before stated is now recognized as law in New York.

Upon a rehearing of *Shellenberger v. Ransom*,² the court pronounced their former opinion erroneous, and finally decided, adopting the second of the three views before stated, that the father and his grantee, although a purchaser with notice, acquired an indefeasible title to the property of his murdered daughter. This second view was adopted also in *Owens v. Owens*³ (1888), where a woman, an accessory before the fact to the murder of her husband, secured her dower; in *Deem v. Milliken*⁴ (1892), where a son murdered his mother and inherited her property; and in *Carpenter's Estate*⁵ (1895), where a son inherited from his father whom he had killed. This view was approved also, extra-judicially, in *Holdom v. Ancient Order*⁶ (1896). In the light of these authorities the view that the legal title does not pass to the murderer as heir or devisee of his victim, being unsound in principle and unlikely to have

¹ 148 N. Y. 149.

² 41 Neb. 631. A short criticism of the reasoning in *Riggs v. Palmer* and *Shellenberger v. Ransom*, on the grounds more fully set forth in this article, appeared in 4 Harv. L. Rev. 394. In a letter to the editors of that Review the counsel for the murderer in the Nebraska case said that his success in obtaining a rehearing was in large measure due to this criticism. Unfortunately the second opinion was more unsatisfactory than the first. For, although both disregarded legal principles, the first was against, while the second was in favor of the murderer.

³ 100 N. C. 240.

⁴ 6 Ohio C. C. 357.

⁵ 170 Pa. 203. WILLIAMS, J. dissented, saying: "The son could not by his own felony acquire the property of his father and be protected by the law in the possession of the fruits of his crime."

⁶ 159 Ill. 619. See editorial comments to the same effect in this *Review*, Vol. 34, N. S., p. 636; and in 29 C. L. J. 461; 32 C. L. J. 337; 34 C. L. J. 247; 39 C. L. J. 217; 41 C. L. J. 377. But, the statement in 42 C. L. J. 133, of the later New York doctrine without adverse criticism is certainly noticeable.

any following in the future, may be dismissed from further consideration.¹

The *res*, then, passing to the criminal, we have only to ask whether he may keep it in spite of his crime, or whether, because of his crime, he must surrender it to the other heirs of the deceased. If the first of these alternatives is the correct one, then is our law open to the reproach of permitting the flagrant injustice of an atrocious criminal enriching himself by his crime. If, on the other hand, the second alternative is adopted, it follows that the decisions in Nebraska, North Carolina, Ohio, and Pennsylvania are erroneous. To the writer it seems clear that these decisions are erroneous, and that the error is due to a failure to discriminate between legal and equitable relief. Both counsel and court appear to have assumed that the only question before them was whether the criminal could take the title to the property of his victim—a purely common-law question. One and all overlooked that beneficent principle in our law by which Equity, acting in *personam*, compels one, who, by misconduct has acquired a *res* at common law, to hold the *res* as a constructive trustee for the person wronged, or if he be dead, for his representatives. The true principle is put very clearly by Andrews, C. J., in *Ellerson v. Westcott*,² the latest of the decisions on the point

¹ As far back as the time of Lord Hale, in *King's Attorney v. Sanda*, Freem. C. C. 129, Hardres, 403, 488 a. c., an authority not cited in any of the recent cases, it was taken for granted by counsel and court that the interest of a *cestui que trust* descended to his only brother, who had killed him. The brother being attainted of murder and therefore having no heirs, the trust was claimed by the Crown, as feudal lord. The claim was not allowed, as there was no escheat of equitable interests, but there being no one who could enforce the trust, the trustee, who was the father of the two brothers, held the legal title for his own benefit.

By the civil law, too, as is pointed out by Mr. F. B. Williams, in 8 Harv. L. Rev. 170-171, the legal title passed to the criminal and was afterwards taken from him.

Should the question arise again in Canada, it is highly probable that *McKinnon v. Landy*, in which a husband killed his wife, who had made her will in his favor, would be supported on the ground that the husband became a constructive trustee for the heirs. The action, as in *Riggs v. Palmer*, was for equitable relief.

² 148 N. Y. 149, 154.

under discussion: "The relief which may be obtained against her (the murderess and devisee) is equitable and injunctive. The court in a proper action will, by forbidding the enforcement of a civil right, prevent her from enjoying the fruits of her iniquity. It will not and cannot set aside the will. That is valid, but it will act upon facts arising subsequent to its execution and deprive her of the use of the property."¹

That there was no mention of this principle in the similar cases that preceded *Ellerson v. Westcott* is the more remarkable, because the distinction here insisted upon, that a person may acquire by force of the common law or by a statute a legal title, and yet be deprived of the beneficial interest in the property by reason of his unconscionable conduct in its acquisition, has been repeatedly recognized and enforced.

E. g., If a grantor has executed a deed, knowing its nature, the deed is effective to pass the title at law, even though he was induced to execute it by the fraudulent representations of the grantee. Accordingly, the fraudulent grantee may, in the absence of a statute allowing equitable defences, maintain ejectment against the grantor, the innocent victim of his fraud.² But the right of the defrauded grantee to relief in equity was recognized in several of the cases just cited, and also, notably, in *Blackwood v. Gregg*,³ and it is, of course, every day's practice for a court of equity to treat a fraudulent grantee as a constructive trustee.

¹ See the similar remarks of Maclellan, J. A., in *McKinnon v. Lundy*, 21 Ont. App. 560, 567: "One can easily understand that in the case of a murder committed with the very object of getting property of the deceased by will or intestacy, the court could defeat that object, even by taking away from the criminal a legal title acquired by such means; and it may be that the court would go further and take the legal title away, even though the crime were committed without that object."

This view finds further confirmation in the opinion of Fry, L. J., in *Cleaver v. Mut. Association* '92, 1 Q. B. 147, 158. See also 4 Harv. L. Rev. 394; 25 Ir. L. Times, 423; 29 Ir. L. Times, 66; 91 L. Times, 261; 30 Am. L. Rev. 130; 6 Green Bag, 534.

² *Feret v. Hill*, 15 C. B. 207; *Mordecai v. Tankersley*, 1 Ala. 100; *Thomas v. Thomas*, 1 Litt. (Ky.) 62; *Jackson v. Hills*, 8 Cow. 290; *Osterhout v. Shoemaker*, 3 Hill, 513; *Kahn v. Old Tel. Co.*, 2 Utah, 174; *Taylor v. King*, 6 Munf. 358; *Lombard v. Cowham*, 34 Wis. 486.

³ *Hayes*, 277, 303-306.

What is true of fraud is equally true of duress practised by the grantee upon the grantor. The grantee gets the legal title to the *res*, but equity gives the grantor a right in *personam*, and thus makes the grantee a trustee *ex maleficio*. But the grantor's right, being merely equitable, is lost, if the *res* is transferred to a *bona fide* purchaser.¹

Fraud and force may be practised not only to procure the execution of a conveyance, but also to prevent the making of a conveyance. In such a case the unexecuted intention of the victim of the fraud or force must at common law count for nothing. The legal title must go just as it would, if the owner of the *res* had never intended to convey it. But here, too, equity will see that the wrong doer or anyone claiming under him, except a purchaser for value without notice, does not profit by his wrong, and will compel him to convey the legal title in such manner as to effectuate the defeated intention of his victim. A clear and cogent authority upon this point is Lord Thurlow's decision in *Luttrell v. Olmuis*, which is thus stated by Lord Eldon, and with his approval, in 11 Ves. 638: "Lord Waltham, tenant in tail, meaning to suffer a recovery, and by will to give real interests to his wife, Mr. Luttrell, who by his marriage had an interest to prevent barring the entail, did by force and management prevent the testator from signing the deed to make the tenant to the *præcipe*: Lord Thurlow's opinion was clear, that though at law Mr. Luttrell's lady was tenant in tail, and, which makes it stronger, she was no party to the transaction, yet neither he nor anyone else could have the benefit of that fraud, and the jury upon an issue directed, having found that the recovery was fraudulently prevented, Lord Thurlow held, even in favor of a volunteer, that the tenant in tail should not take advantage of the iniquitous act, though she was not a party to it; and the estate was considered exactly as if a recovery had been suffered,"²

¹ 9 Harv. L. Rev. 57, 58.

² Lord Eldon, stating this case a second time in 14 Ves. 290, said "Luttrell had, while Lord Waltham was upon his deathbed, engaged in suffering a recovery, prevented it, with the view that the estate should devolve upon the person with whom he was connected (his wife). That estate was by law vested in that individual, a much stronger case, there.

Lord Thurlow applied the same principle in *Dixon v. Olmuis*,¹ overruling the demurrer of Lord Waltham's heir, who, by several acts of fraud and violence, prevented the republication of his ancestor's will. This case, too, was approved by Lord Eldon, who said in *Middleton v. Middleton*:² "If a person be fraudulently prevented from doing an act, this court will consider it as if that act had been done, as in the case of Lord Waltham's will."

As an heir may by fraud or violence prevent the execution of a will, so a devisee may, by the same means, prevent the revocation of a will. The governing principle in such a case is admirably stated by Boyd, C. J., in *Gaines v. Gaines*:³ "A devisee, who by fraud or force prevents the revocation of a will, may, in a court of equity, be considered as a trustee for those who would be entitled to the estate in case it were revoked; but the question cannot with propriety be made in a case of this kind, where the application is to admit the will to record."⁴ The learned reader will at once appreciate the closeness of the analogy between these cases of fraud upon a testator or ancestor, and the cases where the testator or ancestor was killed. If the heir or devisee who gains the legal title by fraud must hold it as a constructive trustee, *a fortiori*, should the same be true of one who acquires the legal title by a revolting crime.

But there are other instances where a legal title or right has been held to pass by force of a statute to a person notwithstanding his misconduct, but where a court of equity has defeated his unjust scheme by compelling him to surrender the *res* to the person wronged.

fore, than the acquisition of property through imposition. Lord Thurlow . . . had no doubt that it was against conscience that one person should hold a benefit which he had derived through the fraud of another."

¹ 1 Cox Eq. 414.

² 1 Jac. & W. 94, 96.

³ 2 A. K. Marsh, 191.

⁴ See to the same effect, *Graham v. Burch*, 53 Minn. 17 (*armble*); *Blanchard v. Blanchard*, 31 Vt. 62 (*armble*); 2 Roberts, Wills (3d Ed.), 31. The decision to the contrary in *Kent v. Mahaffy*, 10 Ohio St. 204, it is submitted, is not to be supported. In *Clingan v. Mitcheltree*, 31 Pa. 28, the equitable aspect of the question was not discussed.

By Statute 7 Anne, c. 20, 91, all unregistered conveyances are to be adjudged fraudulent and void against subsequent purchasers for valuable consideration. In *Doe v. Alsopp*,¹ a grantee who failed to register his deed was defendant in an ejectment brought by a second grantee who bought with notice of the prior unregistered conveyance. It was argued for the defendant that the object of the statute was to protect innocent purchasers only, and the court was asked to read into the statute an exception excluding from its operation those who sought to derive from it an unconscionable advantage. But the judges declined to legislate, saying that plainer words could not be used and that sitting in a court of law they were to give effect to them, and suggesting that the defendant's relief must be sought in equity. And courts of equity have regularly given relief in such cases by treating the second grantee as a constructive trustee for the first.²

In *Greaves v. Tofield*,³ James L. J. says: "Lord Eldon pointed out that there was no altering the language of the Acts of Parliament, there was no dealing with or in any way repealing the Acts of Parliament directly or indirectly, but giving the acts their full force, that is to say, leaving the estate to go in priority to the man who had registered, still if that man had notice of anything by which his vendor or his grantor had bound himself, he was bound by it."⁴

Again by Mo. Rev. St. § 2689, "The homestead of every housekeeper shall be exempt from attachment and execution." In the singular case of *Fox v. Hubbard*,⁵ a decree had been made for a sale under foreclosure of a mortgage covering a house and land; before the sale the house was wrongfully removed to an adjoining lot by the owner of this lot, who at once set up housekeeping in the house. The purchaser at the foreclosure sale bought in ignorance of the removal of the house. The

¹ 5 B. & AL. 142.

² *Le Neve v. Le Neve*, 1 Ven. 64, Amb. 436, 3 Atk. 646, a. c., approved by Lord Eldon in *Davis v. Strathmore*, 16 Ven. 416, 427.

³ 14 Ch. Div. 563.

⁴ See also 1 Pomeroy, Eq. Jur. §§ 430, 431; 2 W. & T. L. C. in Eq. (Am. Ed.) 214; Britton's App. 45 Pa. 172.

⁵ 79 Mo. 390.

house, of course, could not be recovered in specie, for it had become a part of the wrongdoer's realty. It was conceded that the purchaser had an action of tort against the wrong-doer, but the latter was insolvent and insisted on his statutory homestead exemption in his new home. Accordingly, as the court stated, there was no remedy for the purchaser at law. An exception could not be added to the statute, even against a tort-feasor. But giving full effect to the statute, the court decreed that the wrong doer must hold the homestead subject to a lien in equity to the extent of the value of the house removed.

Another illustration is suggested by *Vane v. Vane*.¹ The plaintiff was the true owner of certain land, but was led by the fraudulent representations of the defendant to suppose that he was not the owner, and accordingly suffered the defendant to occupy adversely for more than twenty years. This adverse possession cut off the plaintiff's right of entry and action, and by force of the statute, vested the title in the adverse possessor. But the defendant, because of the fraud in securing his statutory title, was required by equity to reconvey the property to the plaintiff. This decision, it should be said, was made under Section 26 of the Statute 3 & 4 Wm. IV. c. 27, which expressly authorized a bill in equity in such a case. But there seems to be no reason why a court of equity might not accomplish the same result without an express statutory provision. Suppose, for example, that the defendant surreptitiously took the plaintiff's watch, and has concealed his possession of it from the owner for six years. By force of the statute the defendant's possession is unassailable at common law, and the wrongful possessor has now become the legal owner.² But why may not Equity treat him as a trustee? If he had gained the legal title by fraudulently inducing the plaintiff to transfer it to him, he would clearly be a trustee for the plaintiff. What difference can it make to a court of equity whether the legal title came to the defendant through the act

¹ 8 Ch. 383.

² 3 Harv. L. Rev. 321, 322.

of the plaintiff, or by operation of law, if in each case he acquired it as the direct consequence of his fraud.¹

These illustrations, drawn from the misuse of the Statute of Limitations, the Homestead Exemption Statute and the Recording Acts, and from the use of fraud or duress against an ancestor or testator, are obviously governed by the common principle that one shall not be allowed "to enjoy the fruits of his iniquity." Surely murder is iniquity within this principle. Every one must agree with the following statement of Fry, L. J., in *Claver v. Mutual Association*:² "It appears to me that no system of jurisprudence can with reason include amongst the rights, which it enforces, rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanor."

The case from which the remarks of the distinguished Lord Justice are taken, while resembling the American cases where a murderer sought to profit by his crime, suggests certain distinctions. The facts of the case were these: James Maybrick had insured his life in favor of Florence Maybrick, his wife. Mrs. Maybrick was afterwards convicted of the murder of her husband, but the sentence of death was commuted to penal servitude for life. The insurance money was claimed by Mrs. Maybrick's assignee and also by the executors of James Maybrick. The insurance company insisted that the policy was not enforceable by either claimant. Under St. 45 & 46 Vict. c. 75, § 11, James Maybrick was made a trustee of the

¹ There are many conflicting decisions upon the question whether a fraudulent concealment of a cause of action in contract or tort for damages, will suspend the running of the Statute of Limitations. This conflict is surprising, in view of the explicit words of the Statute: "No action shall be brought unless within six (or other fixed number of) years." But here, too, though the right on the old cause of action at law is barred, equity might well give relief. By fraudulently barring the plaintiff's action, the defendant would unjustly enrich himself by keeping for himself what he ought to have paid to the plaintiff. A court of equity should not hesitate to make the defendant surrender this unjust enrichment to the plaintiff. The case would seem to fall within the general principle of quasi-contracts.

² 1892, 1 Q. B. 147.

policy for his wife. But this statute also provided that the moneys payable under the policy should not, "so long as any object of the trust remains unperformed, form part of the estate of the insured." The wife, therefore, was not the sole *cestui que trust* of the policy. As the court said, it was a necessary implication, that, if the wife died before her husband, the insurance money would form part of his estate. The court decided, first, that it was against public policy for Mrs. Maybrick, or her assignee, to enforce the trust because of her crime; and, secondly, that under the statute the result must be the same whether the performance of the trust for the wife was rendered impossible by her premature death or by public policy. In either case the contingent resulting trust in favor of the insured took effect, and therefore the executors of James Maybrick were entitled to the moneys payable under the policy.

The judges intimated that their decision would have been the same, even in the absence of any statute. Mrs. Maybrick would not then have been a *cestui que trust* of the policy, nor, as payee in a contract between the insurer and the insured, would she have had any valid claim under the policy. For, by the English law, only the promisee has rights under a contract, even though it purports to be for the benefit of a third person. In many of the states in this country, on the other hand, the interest in a life insurance policy is vested exclusively and irrevocably in the beneficiary, passing to his representative, if he die in the lifetime of the insured, and enforceable by the beneficiary or his representative by an action at law. How, in one of these states, are the rights of the parties to be adjusted, if the beneficiary killed the insured? The criminal beneficiary would, doubtless, be precluded from recovering the insurance money by the same principle of public policy that defeated the claim of Mrs. Maybrick. On the other hand, it is difficult to find any warrant for saying that the amount of the policy forms part of the estate of the insured. The latter has no contingent resulting interest in the policy. The interest of the beneficiary may have arisen by the gift of the insured, but the gift was complete and irrevocable,

and the conclusion seems inevitable that the insurer is relieved of all liability.

The necessity of a similar conclusion will be more apparent in another case that may be put. The payee of a negotiable note, payable ten days after the death of the maker's father, indorses it to A. for value. The indorsee kills the father. As before, public policy prevents a recovery by the criminal against the maker or indorser. And surely the payee, who has already had the value of the note from the indorsee, cannot receive it again from the maker. The latter profits, not by any merit of his own, but, as obligors frequently profit, by the application of the maxim, *Ex turpi causa non oritur actio*.

With the instances just considered may be contrasted another possible case, suggested by Lord Justice Fry's opinion in the Maybrick case. Suppose land is sold to B. and C., and the conveyance made to B. for life, with remainder in fee to C. C. kills B. How will the murder affect the rights of the parties in the property? B.'s life estate being terminated by his death, C. becomes at law the absolute owner of the land. Will Equity make him hold his fee simple as a constructive trustee? If so, for whom? Certainly not for the seller, for he, having received the price of the land, has no concern with its subsequent history. Nor should C. be made a constructive trustee of the entire estate for the benefit of B.; for that would make C. forfeit his remainder which he acquired independently of his crime. It is not the function of Equity to administer the penal law, but to secure restitution to a person wronged, by compelling the wrongdoer to give up the profits of his misconduct. In the case supposed, C. took from B. no more than the enjoyment of the estate during the years he might have lived but for C.'s crime. This, being the measure of C.'s unjust enrichment, should also be the extent of the constructive trust against him. Perfect restitution in such a case is obviously impossible, both because B. is dead and because it is impossible to know how long he would have lived. We must be content with the closest possible approximation to complete justice. As restitution cannot be made to B., it must be made to him who, in matters of property, stands in his place—that is, his heir.

And the amount of the restitution must be determined by estimating, according to the tables of mortality, how many years a person of B.'s age would probably have lived. For the period thus ascertained equity would require C. to hold the land as a constructive trustee for B.'s heir.

Similar reasoning would be applicable if land bought by B. and C. had been conveyed to them as joint tenants in fee simple, and C. were then to murder B. Each joint tenant has a vested interest in a moiety of the land so long as he lives, and a contingent right to the whole upon surviving his fellow. The vested interest of C., the murderer, cannot be taken from him even by a court of equity. But C. having by his crime taken away, B.'s vested interest must hold that as a constructive trustee for the heir of B.; and, it being impossible to know which of the two would have outlived the other, equity would doubtless give the innocent victim the benefit of the doubt, as against the wrong doer who had deprived him of his chance of survivorship, and accordingly give the entire equitable interest to B.'s heir upon C.'s death.

The results reached in these cases must commend themselves to everyone's sense of justice. But all will admit that these results could not be accomplished by common-law principles alone. The common law would make the criminal remainderman in the one case, and the criminal joint tenant in the other case, the absolute owner of the land. Equity alone, by acting in *personam*, can compel the criminal to surrender what, in spite of his crime, the common law has suffered him to acquire. It is much to be regretted that counsel did not invoke, and that the courts of Nebraska, North Carolina, Ohio and Pennsylvania did not apply, in the cases recently before them, the sound principle of equity, that a murderer or other wrong doer shall not enrich himself by his iniquity at the expense of an innocent person.

James Barr Ames.

Cambridge, April 15, 1897.

A PLEA FOR A STATUTE.

The well-known tendency of the lawyer engaged in the drafting of conveyances is to adhere as closely as possible to the beaten paths; to follow the forms handed down from the fathers; to view with suspicion and close scrutiny any departure therefrom, and to insert new clauses and covenants only when convinced that they are demanded by the necessities engendered by conditions and enterprises unknown to a former day.

It is comparatively rare, however, to see him look upon this beaten path and doubt; to take up one of the time-honored forms and pause; to study a rule of law propounded in the reign of Edward II., and in drawing an instrument with the intention of avoiding the operation of that rule, to feel that the use of one synonym instead of another will result in the enforcement of the rule and the defeat of his purpose.

Yet this is the situation to-day of the Pennsylvania lawyer who has been employed to draw a deed or will creating an estate for life in the first taker with remainder to his issue, offspring, heirs or children. The advice may be given him to stop, look, and ponder, for the beaten path is treacherous.

The case of *Grimes v. Shirk*, 169 Pa. St. 74 (May 20, 1895), is the latest thus far officially reported touching the Rule in Shelley's Case. It was an appeal from the Common Pleas of Lancaster County, and the judgment was affirmed by the Supreme Court upon what was justly pronounced "the able and exhaustive opinion" of the court below, Livingston, P. J.

The ruling was upon the proper construction to be given to the following clause in a will:

"I give and devise to my adopted daughter Hester . . . all that certain message . . . for and during the term of her natural life. And after the death of my said adopted daughter, I give and devise the reversion or remainder of the real estate herein devised to her, to her lawful issue, to have and to hold the same to them, their heirs and assigns forever, And in case the said Hester should die without leaving lawful issue, then the aforesaid real estate shall revert to my estate, and I give and devise the same to my heirs under the intestate laws."

Held, that Hester took an estate in fee in the land devised to her.

There should have been nothing surprising in this ruling except, perhaps, to the lawyer who drew the will and thought that he was effectuating the intention of the testator. The Rule in Shelley's Case has been a landmark of real estate law for centuries, and the court followed a host of authorities in holding that this devise was within the rule. Another case involving the same point (*Heister v. Yerger*, 166 Pa. St. 445) had been decided four months earlier in the same way, though the opinion was not so full. That was the case of a devise to a nephew for life and after his decease, to his then surviving heirs in fee simple. *Held*, that the nephew took a fee simple estate in the land.

Just here arises the difficulty and commences, in the language of Judge Brewster, (III Practice, Sec. 3940) "such a clashing of authority as tends to perplex and bewilder the practitioner"—"an evil unquestionably serious". The question is, as above stated, how is an instrument to be drawn under the Pennsylvania authorities which will vest a life estate in the first taker with remainder to his heirs, with the same degree of certainty as is incident to an ordinary conveyance to a grantee in fee?

There ought to be some way of effecting it. It is not intricate or complex; on the contrary, it is one of the first modes of disposing of an estate that suggests itself to a testator. I assert, nevertheless, that without legislative intervention it cannot be done upon any other foundation than the hope that the Supreme Court will follow a certain line of its own decisions rather than another.

In 1876, Mr. Joseph P. Gross, of the Philadelphia Bar, prepared a set of nine "Tabular Statements of the Decisions of the Supreme Court of Pennsylvania upon the Rule in Shelley's Case," of which five hundred copies were printed for the use of the State Senate. It evinces a careful examination of the authorities and affords proof by diagrams of the confusion referred to; one table containing a summary of the special features in each case where certain words received one construction, and the succeeding table containing the cases giving *the same words* precisely the opposite construction; and so on, throughout the tables.

There are to be found in our Supreme Court Reports more than one hundred cases involving the Rule in Shelley's Case. They may be classified as follows, it being understood, of course, that words of limitation carry the fee to the first taker, those of purchase giving him only a life estate and preserving the remainder :

	Limitation.	Purchase.
Heirs	21	6
Heirs of the Body	6	2
Issue*	12	16
Children	7	27
Offspring	1	
Words equivalent to Heirs	1	

Upon an account stated of the foregoing figures, it would seem that the word "Children" is the only one that can be safely employed for the end in view. This conclusion is strengthened by the fact that the six decisions of the Supreme Court since 1887, construing this word, have held it a word of purchase, although in that year the same court, in *Mason v. Ammon*, 117 Pa. 127, held a devise to a sister "and at her death to her child, children or other lineal descendants," to vest a fee-tail, converted by the statute into a fee-simple, in the first taker, the latter words qualifying the words "child or children" and making them words of limitation.

In more than one of the latter cases, such as *Keims Appeal*, 125 Pa. 480 (1889), reference is made to *Cote v. Von Bounhorst*, 41 Pa. 243 (1861), where the court say: "We spend no time in showing that, under a devise to one for life with a remainder to his or her *children*, the first taker has no freehold of inheritance. That such is the general rule is beyond doubt." Yet, in *Haldeman v. Haldeman*, 40 Pa. 29 (1861), the Supreme Court, speaking by the same judge (Strong), held a devise to three daughters, executors to pay them the rents and income during their lives, and at their deaths the estate "to descend and go to the *child*, and if *children*, share and share alike, and in default of issue," then over, to be an estate tail converted into a fee.

And, in *McKee v. McKinley*, 33 Pa. 92 (1859), the court

* The sixteen cases construing the word "Issue," it will be remembered, have now been overruled, by *Grimes v. Shirk* (*supra*).

held a devise to a daughter for her sole use "revertible" after her death to her *children*, and in case of no children or issue of children, then over, to vest a fee simple in the daughter.

(It ought, perhaps, to be noted that the report of this case states that "Strong, J., was absent at *Nisi Prius*.")

These cases followed *Stewart v. Kenover*, 7 W. & S., 288 (1844); *Williams v. Leech*, 28 Pa. 89 (1856), and *Nagler's Appeal*, 33 Pa. 89 (1859), but still we are told, in *Cote v. Von Bonnhorst*, that the doctrine stated is the general rule and beyond doubt. Attention may, therefore, well be called here to the case of *Oyster v. Knull*, 137 Pa. 448 (1890), where the court below, Simonton, J., had construed the word "children" as equivalent to "heirs." While the Supreme Court reversed this construction, it remarked (p. 453): "It cannot be said that the construction we have adopted is entirely free from doubt."

And it cannot be said that this doubt has been lessened by the recently reported case of *Ralston v. Truesdell*, 178 Pa. 430. In that case the language of testator was:

"I leave and bequeath unto my granddaughter N. all the real property that my wife enjoys during her life, and at my wife's death I bequeath the same property that she held during her life to N. and *the heirs of her body*; but if she should die and leave no *child or children*, then in such a case the said property shall be sold to the best advantage and equally divided among my other legatees and their heirs."

The Supreme Court affirmed the judgment of the court below on the opinion of McIlvaine, P. J., holding that the words "heirs of the body" created an estate tail in N., which the words "child or children" did not affect; that although this estate was enlarged by the statute into a fee-simple, the other legatees and their heirs took an executory estate in fee; that N. dying leaving no children, the estate tail (though now a fee simple) was to be abridged by the happening of that contingency and the estate in fee vested in the "other legatees and their heirs;" but, finally, that N., having executed a deed under the act of Jan. 16, 1799, to bar the entail (the grantee immediately reconveying the property to her) also by such deed barred the executory devise to the "other legatees" of the testator.

Lack of space forbids further elaboration of detailed cases, but it will be well to note, at this point, the fact that nearly all the decisions upon the subject have been upon cases where the title has been claimed or attacked through a *will* and an effort made to arrive at the intention of the testator. Now, it is recognized law that a distinction exists in point of strictness between the construction of wills and that of deeds, the latter being presumed to have been made "with forethought and care." We are forced to wonder how, under the Pennsylvania decisions, a greater degree of care *can* be employed than that shown to be necessary in the preparation of an instrument always construed with indulgence.

Judge Brewster (III Practice, p. 101), in Section 3953, entitled "To avoid defeat of testator's intention," recommends the avoidance of the words "heir" or "heirs" unless the heir is named; and also the avoidance of the words "heirs of his body," "issue" and "children," unless the cases classified by him under the heads "Issue, a Word of Purchase" and "Children, a Word of Purchase," are closely followed. But if certain children are mentioned by name, will the estate open and let in those subsequently born and not named? If not, the intent of a testator who desires all to share alike will certainly be defeated.

It has been suggested that the employment of trustees for the use of the life tenant and, at his death, to pay over the estate to the remaindermen might, in some way, affect the situation and effectuate the deviser's or grantor's intent. But the Supreme Court has repeatedly ignored that medium and recognized a *fee simple in the equitable life tenant*. The leading case on this point is that of *Ogden's Appeal*, 70 Pa. 501 (1872), cited approvingly in *Grimes v. Shirk* (*supra*).

The conclusion of the whole matter, it is again submitted, is that, in the present condition of the decisions, there can be no absolute certainty without legislative intervention. Such intervention has been obtained in New York, Massachusetts, Connecticut, New Jersey, Mississippi, Virginia, Kentucky, Ohio (as to wills), Maine, Michigan, Tennessee, Wisconsin, Minnesota, Missouri, Alabama, and New Hampshire (as to

wills). Why can not we have a statute by which a distinct line of demarcation will be drawn and instruments for these purposes lifted out of the "seeming clear" and the conjectural "if there be enough on the face of the will," and placed finally upon a foundation which will make it unnecessary for our courts to say, as the Supreme Court very properly said in *Heister v. Yerger* (*supra*), "*We must apply the rule governing cases of this kind, although by so doing we defeat the particular intent of the testator?*"

The following is suggested as a form of such a statute :

"*Be it enacted, etc.*, that where any estate in real property is given by deed or will to any person for his life, and after his death to his heirs or the heirs of his body, issue, children or offspring, by whatever words of equivalent import they may be designated, the conveyance or will shall be construed to vest an estate for life only in such person and a remainder in fee simple in his heirs, the heirs of his body, issue, children or offspring."

(NOTE.—As is pointed out in II. Minor's Institutes (Virginia), p. 405, this form would not toll the effect of the rule where any estate of freehold other than an estate for the life of the ancestor is first granted—*e. g.*, an estate for the life of another. Instances of this kind are, however, rare, and for conveyancing purposes it is believed that the above would suffice.)

Pennsylvania may safely be pronounced a most conservative state in regard to the adoption of amendments to her established laws. Indeed, she may be said to carry this conservatism at times to a perilous extreme. A rule of law may be gray with age and therefore venerable ; but it may also be gray with mildew and absurd, to describe it by no harsher term. Only in 1855 was the Statute of Frauds, in the form that had obtained since 29 Car. II in England, and for decades prior to 1855 in most of the American states, completed in this state. Only in the same year was passed the act abolishing estates-tail. Only in 1874 was a constitution adopted which prohibited local or special legislation—an evil, which, had it continued much longer, must have resulted in the necessity of legal specialists for each county. And not yet has a uniform Practice Act been provided to take the place of the differing rules of court of the fifty-four judicial districts of the state.

No serious opposition to a movement for this advance in our real estate law should be anticipated. As soon as its merits

are explained to the layman they will be acknowledged by him ; for one of the anomalies which he holds in greatest dread is a legal instrument which says one thing and means another—the reason of the difference being in this case simply impossible of explanation to him.

Will not one of the lawyer-members of the General Assembly, now in session, take up this matter and by securing the enactment of a statute similar to that suggested put an end to the "perplexity and bewilderment" of the practitioner and earn the thanks of all who believe in a quiet title?

George Bryan.

Titusville, Pa., April 15, 1897.

DONATIO MORTIS CAUSA OF ONE'S OWN CHECK.

I. *Development of Principle.* The purpose of this article is to maintain that a *donatio mortis causa* may be well executed, in equity, upon the giving of a check by the donor, even though the check is not paid or presented before the donor's death.

The recent decision by the United States Supreme Court in *Fourth Street Bank v. Yardley*, 165 U. S. 634, strengthens the doubt of those who have questioned certain English decisions by courts of the first instance denying validity to such gifts.

Since there are a few cases, a very few, in which the gift under such circumstances has been held to have failed for want of execution, it is just as well to say at the outset that there is no desire to cut a figure by assailing decisions of courts of great respectability. The work of reverting to the main column of decisions, from which it is apprehended some temporary wandering has occurred, is the present and more gracious endeavor.

Let it be remembered that it was recognized at a very early day that "there are many articles which might be made the subjects of a donation *mortis causa*, in which a manual delivery might be inconvenient or impracticable."¹ Thus delivery of the key to bulky casks wherein wines, etc., are, was allowed as delivery of possession because, said Lord Hardwicke, "it is the way of coming at the possession or to make use of the thing."²

The law having recognized the principle that delivery of the means of coming at possession is sufficient evidence of a gift, plenty of occasions arose to give the principle activity.

In 1744, Lord Chancellor Hardwicke had before him *Snelgrove v. Bailey*, 3 Atk. 214. In that case the bond of a third person in favor of donor was delivered by the donor to the donee as a gift *mortis causa*. Lord Hardwicke held that there

¹ *Coleman v. Parker*, 114 Mass. 30.

² *Ward v. Turner*, 2 Ves. Sr. 431, 443.

was a good gift. He said: "You cannot sue at law without the bond; for though you may give evidence of a deed at law that is lost, yet you cannot of a bond, because you must make a profert of it." Now this language of the chancellor was very narrow and needlessly technical; but nevertheless it recognized anew the doctrine applied in the case of keys to articles inconvenient of carriage, viz.: that delivery of the means of getting at the possession will effect a good *donatio mortis causa* which equity will enforce.¹

The recognition of the effect of *Snelgrove v. Bailey* was for a long time slow, and much contested. There was much incumbrance, too, by other difficulties. In cases of mortgages, there was question whether the statute of frauds operated to prohibit parol gifts of what might be thought to convey interests

¹ As the text intimates, *Snelgrove v. Bailey* has the appearance of resting on narrow grounds: Delivery of the bond is actual delivery of some property; the law puts it in the donee's power, by destruction of the bond, to destroy donor's action (at common law) by thus preventing profert. Moreover, the English law was that bonds have locality, and are *bond notabilia*, so that the administration must be taken out in the diocese where it is found. These things being so, delivery of the bond was quite a clear manifestation of a parting with dominion, and was sufficient to satisfy a chancellor that he should enforce the intent of the donor. If we regard these as being the chancellor's reasons, and regard the decision as lacking support on any general principle applicable in cases of instruments other than bonds, then we are compelled to regard the decision of that great judge as being an isolated and arbitrary one. For there are other instruments delivery of which attest quite as strongly the purpose of yielding dominion; as where a mortgagor, or a third person's note is handed over to a donee. The reasons of Lord Hardwicke appear, however, to be put in the way of illustration of a general principle. There are two indications of this, as Lord Eldon pointed out in *Duffield v. Elwes*, 1 Bll. N. R. In the opinion, Lord Hardwicke refers to delivery of government tally sticks, etc., as analogous cases. And in *Ward v. Turner*, 2 Ves. Sr. 431, decided by him eight years afterwards, after remarking that he could go no further than he went in *Snelgrove v. Bailey*, he went on to say that since the stock receipts of his day were "waste papers," "no evidence of the thing," delivery of them was of no avail to sustain the gift. This shows quite clearly that his theory in *Snelgrove v. Bailey* was that he could extend aid where the instrument delivered represented the debt in such a manner that if the donor parted with it the donor delivered the means of getting at possession. *Snelgrove v. Bailey*, then, must be taken to assert a general principle, *not* confined to the cases of bonds, as is well explained by Lord Eldon, in the complementary case of *Duffield v. Elwes*, 1 Bll. N. R. 497.

in land.¹ In the case of certificates of stock, trouble was encountered by reason of the requirement, that transfer must be approved by the corporation and registered in the corporation books. This difficulty is possibly not entirely cleared away, yet, although one can scarcely see how any court can hesitate here unless it is ready to overrule Lord Hardwicke and Lord Eldon. We think these difficulties disappear, so soon as it is appreciated that the courts recognize the theory of equitable assignment as between donor's estate and the donee, upon a delivery by the donor of the means of getting possession.

In *Duffield v. Elwes*, 1 Bli. N. R. 497, there was delivery of a bond for £2927, and of a mortgage securing the same money; also there was delivery of a mortgage for £30,000, judgment notes, etc., the whole aggregating upwards of one hundred and fifty thousand dollars. There was also a written statement delivered declaring the gift of the bond and of the two mortgages. A judgment on the bond was also conveyed by the said statement.

The House of Lords decided that delivery of the mortgage attested the gift of the debt it secured, and that the debt being given, carried with it the mortgage. Lord Eldon commented at large on the objection that conveyance of land should be in accordance with the statute of frauds, and held that the objection could not stand; that the conveyance was of the mortgage debt and not of the land.

The second difficulty was as to perfecting gifts *mortis causa* void at law. This, as has been seen, was done first in *Snelgrove v. Bailey*, where the chancellor perfected the gift of a bond, although the gift was void at law. And although Lord Hardwicke afterwards said, in *Ward v. Turner*, that he could go no further than he went in *Snelgrove v. Bailey*, we have seen that he meant that he could not extend aid where the instrument did not represent the debt in a manner that made it a means of getting possession of the money. In *Duffield v. Elwes*, Lord Eldon said that the principle that equity will perfect donations *mortis causa* when the donor has parted with

¹ See *Richards v. Sims*, 2 Atk. 319; *Hassel v. Tyorta*, 1 Amb. 1318; *Hirst v. Beach*, 5 Madd. 351; *Duffield v. Elwes*, 1 Bli. N. R. 497.

the means of getting at the property ought not to be narrowed by mere technicalities; that the chancellor ought not to lay stress, therefore, on Lord Hardwicke's remarks respecting bonds as distinguished from most other instruments representing property, especially as one of the peculiarities relied upon by that judge, namely, the need of profert in suit on the bond, was so very technical that now it is no longer necessary, when the bond is lost. Accordingly, the House of Lords preferred a more general rule. It was determined, then, that because the mortgage represented the debt, "formed part of the title," the debt itself passed, not, indeed, at law, nor yet in equity, as against the donor *mortis causa*, but passed sufficiently for equity to recognize and perfect the conveyance if the donor regarded the transaction as a complete act, and died without revoking the gift: on the ground that this would not be against the donor, but in furtherance of his intent. The executor of the donor was therefore considered in equity as trustee for the donee, and the latter could use the name of the executor in a suit on the security.

All this reasoning applies to many other securities, or evidences of undertaking. Hence, the principle has been applied to uphold gifts of a third persons note¹ although payable to order and unendorsed²; to gifts by delivery of a bill of exchange of a third person payable to donor's order, although unendorsed,³ or by delivery of certificate of deposit likewise payable to order and unendorsed.⁴

¹ *Borneman v. Seidlinger*, 15 Maine, 429; *Turpin v. Thompson*, 3 Met. (Ky.) 420; *Sessions v. Mosley*, 4 Cush. (Mass.) 87; *Bates v. Kempton*, 7 Gray (Mass.), 382; *Kilby v. Godwin*, 2 Del. Ch. 61; *Holley v. Adams*, 16 Vt. 206.

² *Veal v. Veal*, 27 Beavan, 303; *Brown v. Brown*, 18 Conn. 410; *Westerlo v. De Witt*, 36 N. Y. 340; *Daniel v. Smith*, 64 Cal. 346. In *Brown v. Brown*, delivery of note secured by mortgage was held to pass the mortgage. See also *Jones on Mortgages*, par. 817.

³ *Rankin v. Weguelin*, 27 Beav. 309.

⁴ *Conner v. Root*, (Cal.) 17 Pac. Rep. 773; *Basket v. Hassel*, 107 U. S. 608; *Gourley v. Linsenbighler*, 51 Pa. 349; *Ames v. Witt*, 33 Beav. 619; *In re Taylor*, 56 L. I. Rep. (U. S.) 597; *Westerlo v. De Witt*, 36 N. Y. 340; *O'Brien v. O'Brien*, 5 Ont. 450; *Stephenson v. King*, 2 Bush. (Ky.) 228; *Moore v. Moore*, 18 Eq. 474.

In New York, following the theory of these and other decisions, gifts of certificates of stock have been sustained in equity, although the transfers had not been transferred on the corporation books¹ and hence not good against the company.

The principle has been applied in cases of gifts of savings-banks. The ordinary savings-bank book does not represent the debt due by the bank. Suit cannot be brought on the book as it can on a mortgage, a bond, a note. The action is on the debt, whereof the book is not a representation. It is not itself a promise by the bank to pay. It is, however, emphatically a part of "the means of getting at the possession" of the money deposited, for the usual rule of savings banks is that the money will not be paid except on presentation of the book. Here it is that Lord Hardwicke's rule and Lord Eldon's in *Snelgrove v. Bailey* and *Duffield v. Elwes*, finds its operation. Being the means of getting at the possession, delivery of the book by the depositor will support a gift *mortis causa*. Such a delivery is a striking evidence of a surrender and delivery of dominion. This has been held in

¹ *Walsh v. Sexton*, 55 Barb. 251; approved in *I. Parson's Contracts*, 237. See *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 150; *Brown v. Smith*, 122 Mass. 589; *Fitchburg Sag. Bk. v. Torrey*, 134 Mass. 239; *Hall v. U. S. Ins. Co.*, 5 Gill (Md.), 484; *Grymes v. Hone*, 49 N. Y. 17; *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365; *Cook v. Stock*, § 378; *Dos Passos on Stock Brokers*, 623. See *I Morawetz on Private Corporations*, § 226.

It is true, indeed, that there is some slight indication of a disposition in one or two English cases to treat certificates of stock as merely executory in their nature. See *Moore v. Moore*, 18 Eq. Ca. 474; *Lambert v. Overton*, 13 W. R. 227, is ambiguous. In Maryland, an attempt to make a gift by delivery of the certificates with the endorsement of their owner was held to be of no avail: *Pennington v. Gitting's Est.*, 2 Gill & J. 208, 1830. But the prevailing rule would seem to be as indicated in the text: See *Stone v. Hackett*, 12 Gray (Mass.), 227. The reasoning of *Duffin v. Duffin*, 44 Ch. D. (1890) 76, is both very strong and very *apropos*; in that case, a deposit note was held by the Court of Appeals to be the valid subject of a *donatio mortis causa*. The note bore considerable analogy to savings-bank books; it had on its back a form of check to be signed on withdrawal. *Cotton, L. J.*, said: "If the document was lost, they would require some explanation why it was not forthcoming before they paid the money, but I do not think that they could refuse to pay." The gift as sustained.

so many cases that the mere citation of the authorities is somewhat of a task. They are given in the note.¹

Pennsylvania,² and possibly Maryland,³ have decided otherwise. In Great Britain the question remains open.⁴ There is considerable reason to believe that the Pennsylvania court will yet apply the same rule to gifts of savings-bank books as it has applied to securities, and uphold the donations.⁵

The principle of *Sudgrove v. Bailey* and *Duffield v. Elwes*, that delivery of "the way of coming at the possession" is

¹ Massachusetts: *Pierce v. Savings Bank*, 129 Mass. 425. See also *Shedy v. Roach*, 124 Mass. 472; *Rockwood v. Wiggins*, 16 Gray (Mass.), 402; *Debbinson v. Emmons* (Mass.), 33 N. E. Rep. 706.

New York: *Ridden v. Thrall*, 26 N. E. Rep. 627; *Walsh v. Bowery Savings Bank*, 26 N. E. Rep. 627. See *Fiero v. Fiero*, 2 Hun. 600, where the case turned on evidence. And see *Orr v. McGregor*, 43 Hun. 531.

Connecticut: *Brown v. Brown*, 18 Conn. 410; *Camp's Appeal*, 36 Conn. 88.

Rhode Island: *Tillinghast v. Wheaton*, 8 R. I. 536. And see *Providence Institution for Savings v. Taft*, 14 R. I. 502.

Maine: *Curtis v. Portland Savings Bank*, 77 Maine, 151; S. C., 52 Am. Rep. 730. See also *Hill v. Stevenson*, 63 Maine, 364, a case of gift *inter vivos*.

Alabama: *Jones v. Weakley*, 12 S. E. Rep. 420, a *dictum*.

Kentucky: In this State it has been declared that, so far as the early cases of *Ashbrook v. Ryan*, 2 Bush, 228, is opposed to the validity of a gift by delivery of the savings-bank book, it is to be regarded as overruled: *Stephenson v. King*, 81 Ky. 425.

See also the reasoning of the United States Supreme Court in the elaborate opinion in *Basket v. Hassell*, 107 U. S. 602. See also *Morse on Banks and Banking*, 3d Ed., by Prof. Parsons, par. 608; *Foss v. Lowell Five Cents Savings Bank*, 11 Mass. 285; *Camp's Appeal*, 30 Conn. 88; *Brown v. Brown*, 18 Conn. 410; *Davis v. Ney*, 125 Mass. 590.

In Vermont the question was left undecided in a case in 1867: *French v. Raymond*, 39 Vt. 623.

² *Walsh's Appeal*, 122 Pa. 177.

³ *Murray v. Cannon*, 41 Md. 466. It is of some significance that, in *Conner v. Snowden*, 54 Md. 175, the court's remarks were directed rather to the donor's omission to observe certain requirements of the donor. Had the court been opposed to such gifts, these remarks would have been needless.

⁴ See *McConnell v. Murray*, Irish Rep. 3 Eq. 450 (1869). In *In re Beak*, L. R. 13 Eq. 489, the decision is rested on the fact that the savings bank book did not embody the terms of the contract. See *Duffin v. Duffin*, note, *supra*.

⁵ See *Commonwealth v. Crompton*, 137 Pa. 138, at p. 147.

delivery of dominion and will uphold the gift, has been applied in cases of delivery of the following other instruments : a third person's check,¹ attorney's receipt for obligation filed in a suit,² policy of insurance,³ or bill of sale of the policy.⁴

The review that has just been given of the development and extent of the doctrine of equitable gifts *mortis causa* shows that the House of Lords has been followed fully in its decision in *Duffield v. Elwes*,⁵ to the effect that "the principle of not assisting a volunteer to perfect an incomplete gift does not apply to a *donatio mortis causa*,"⁶ and in the principle likewise recognized by them that, where the means of getting at possession is delivered, equity will regard the gift as complete.

In the concluding part of this article, we will take up the question whether the donor's own check can be the subject of a gift *mortis causa*.

Luther E. Hewitt.

(To be concluded.)

Philadelphia, April 15, 1897.

¹ *Burke v. Bishop*, 27 La. An. 465.

² *Klam v. Keen*, 4 Lehigh (Va.), 333, cited in *Yancey v. Fields* (Va.), 8 S. E. Rep. 721.

³ *Ames v. Witt*, 33 Beav. 619; *R. Hughes*, 36 W. R. 821.

⁴ *Williams v. Gulle*, 117 N. Y. 343.

⁵ 1 Bl. N. R. 497.

⁶ Quoting *Lindley, L. J.*, in *Duffin v. Duffin*, 44 Ch. D. 76, 83 (1890).

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS FOR MARCH.

**Banks and
Banking.
Cheque,
Forged
Indorsement.
Liability of
Banker**

In a very interesting case recently tried in the Commercial Court at London, before Collins, J., without a jury, it appeared that a cheque was drawn in London in favor of the plaintiff on the defendant bank, which carried on business in London and had a branch in Paris. This cheque was specially indorsed by the plaintiff to a firm in London and mailed to that firm for collection, but it never reached them. After it had been mailed, a forged indorsement was put on the cheque, and it was presented at the defendants' Paris branch by a person purporting to be the last indorser, who had no account at the defendants' banks. When presented, it was crossed generally.

The Paris branch paid the cheque, and sent it to the London bank, which credited the Paris bank with the value. The London bank refused to deliver the cheque to the plaintiff, who thereupon sued it for conversion. The judge held, (1) That by paying the cheque, forwarding it to the London bank, and crediting their Paris bank with the value, the defendants were guilty of a conversion of the cheque in England, and the case was therefore governed by English law; (2) That the person who obtained payment of the cheque was not a "customer" of the bank, within the meaning of p. 82 of the Bills of Exchange Act, 1882, (45 & 46 Vict. c. 61.) which provides that "where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment; and (3) That the defendants, having paid the cheque on a forged indorsement, were not

protected by any of the provisions of the act above cited, but were liable for the value of the cheque under § 24 of that act, which declares that "subject to the provisions of this act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:" *Lecave v. Credit Lyonnais*, [1897] 1 Q. B. 148.

On the other hand, the Superior Court of Pennsylvania has recently decided, that the rule that when one or two innocent

<p>Forged Cheque, Liability to Depositor</p>	<p>persons must suffer loss the party who did the act which was the occasion of the loss ought to bear it, does not apply where a depositor in a bank, without its knowledge, had made a rubber stamp which was a substantial facsimile of his signature, and that stamp was stolen from his clerk by an office boy, and used in forging cheques, which the bank paid. It accordingly held the bank liable for the amount of the cheques: <i>Robb v. Penna. Co.</i>, 3 Pa. Super. Ct. 254.</p>
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This decision seems to rest upon the ground that the bank was negligent in paying a cheque with a stamped signature; and under the facts of the case that contention may be justified. It does not appear that the plaintiff had ever signed a cheque with this stamp; and no matter how well made, a stamp signature must necessarily have a regularity of outline or a broadness of impression that a pen-and-ink signature lacks. The two, therefore, are sufficiently different to be readily distinguishable; and the bank was negligent in not scrutinizing the cheque with sufficient care to notice that the signature was not made as usual. But if the plaintiff had been in the habit of signing cheques with this stamp, or had occasionally so signed them, or if the bank had known that he possessed this stamp, there would have been no negligence in paying the cheques, and the bank would not have been liable.

The Supreme Court of Mississippi lately refused to extend the rule which permits a common carrier to refuse to accept for passage persons who are so infirm as to require the care of an attendant, to the case of one, who, though blind, was strong and robust; and held that the agents of the company were guilty of a wrong in refusing to sell such a person a ticket solely on the ground that he was blind, and not accompanied by any one: *Zachery v. Mobile & O. R. R. Co.*, 21 So. Rep. 246.

Carriers,
Refraction of
Passengers,
Blind Person

In *Turner v. St. Clair Tunnel Co.*, 70 N. W. Rep. 146, where the defendant company had sent the plaintiff, who was in its employ on the American side of the St. Clair Tunnel, over to the Canadian side, to work at that entrance, the Supreme Court of Michigan decided that the right of the plaintiff to recover for the negligence of the defendant in allowing him to enter on dangerous work there was governed by the laws of Canada.

Conflict of
Laws

An agreement to fix uniform rates of insurance has been held to be within the meaning of a statute (McClain's Code Iowa, § 5454) which provides that "if any corporation organized under the laws of this state or any other state or country, for transacting or conducting any kind of business in this state, or any partnership or individual, shall, create, enter into, become a member of or party to any pool, trust, agreement, combination or confederation with any other corporation, partnership or individual to regulate or fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity or article whatever; or shall create, enter into, become a member of or a party to any pool, agreement, combination or confederation to fix or limit the amount or quantity of any commodity or article to be manufactured, mined, produced, or sold in this state, shall be deemed guilty of a conspiracy to defraud, and be subject to indictment and punishment: *Beechley v. Mulville*, (Supreme Court of Iowa,) 70 N. W. Rep. 107.

Conspiracy.
What
Constitutes
Agreement
to Fix
Insurance
Rates

In the same case the court also held that where an agreement by insurance agents to fix insurance rates provides that all agencies shall be taken away from one who breaks it, a member who does break it cannot recover damages, on the ground of conspiracy to injure his business, from companies for which he was agent under contracts permitting them to revoke the agencies at will, and their special agents, none of whom are members of the agreement, on an allegation that they, acting together to enforce the agreement, revoked the agencies, on his refusal to observe its terms.

The Supreme Court of New York, Appellate Division, First Department, has ruled that the act of that state of 1893, c. 661, § 153, as amended by the act of 1895, c. 398, making it a misdemeanor for any person who has been convicted of a felony to practice or attempt to practice medicine, is *ex post facto*, so far as it applies by its terms to persons convicted before it took effect, because the illegality of the act constituting the new offense is predicated entirely upon the commission of the former offense, without regard to the present character of the defendant: *People v. Hawker*, 43 N. Y. Suppl. 516.

The Supreme Court of the United States in the recent case of *Robertson v. Baldwin*, 17 Sup. Ct. Rep. 326, held that Rev. Stat. U. S., §§ 4598 and 4599, which authorize the apprehension, imprisonment, and return on board of deserting seamen in the merchant service, are not invalidated by the prohibition of "involuntary servitude" in the Thirteenth Amendment; basing its conclusion upon the fact that from time immemorial the contract of a seaman has been a peculiar one, and has always been liable to be enforced against his will.

From this decision Mr. Justice Harlan dissented. His whole opinion is well worth perusal, but the following contains the kernel of it: "It will not do to say that by 'immemorial usage' seamen could be held in a condition of involuntary servitude, without having been convicted of crime. The people of the United States, by an amendment of their fun-

damental law, have solemnly decreed that, 'except as a punishment for crime, whereof the party shall have been duly convicted,' involuntary servitude shall not exist in any form in this country. The adding another exception by interpretation, simply, and without amending the constitution, is, to submit, judicial legislation. It is a very serious matter when a judicial tribunal, by the construction of an act of Congress, defeats the expressed will of the legislative branch of government. It is a still more serious matter when the reading of a constitutional provision relating to the rights of man is departed from in deference to what is called 'the common sense' which has existed, for the most part, under monarchic and despotic governments."

delegation to the Secretary of War, by act of Congress of March 3, 1890, (26 Stat. at Large, 453, §§ 4, 5, 7.) of authority to direct changes in existing bridges over any navigable waters of the United States, or of bridges to be erected under legislative authority of any state, for the purpose of preventing obstruction to navigation, does not affect the control of a state over navigable waters wholly within its jurisdiction, since the act shows no intention by Congress to exercise exclusive control over such waters; and consequently this act did not deprive the states of power to compel the removal or alteration of bridges erected over such waters without authority: *Lake Shore & M. S. Ry. Co. v. State of Ohio*, 17 Sup. Ct. Rep. 356.

The Supreme Court of Appeals of West Virginia recently decided that the act of that state (Laws 1891, c. 8) which provides that from and after its passage, it shall be unlawful for any manufacturer or vender of oleomargarine, artificial or adulterated butter, to manufacture, or offer for sale within the limits of the state any oleomargarine, artificial or adulterated butter, whether the same be manufactured within or without the state, unless the same shall be colored pink, and prescribes a penalty for a violation thereof, is not unconstitutional: *State v. Myers*, 26 S. E. Rep. 520.

Sale of
Adulterated
Food,
Oleomargarine

In *Smith v. San Francisco & N. P. Ry. Co.*, 47 Pac. Rep. 582, the Supreme Court of California lately held, that a person is not entitled to vote at the meetings or elections of a corporation upon stock in which he has never had any interest, but which is registered in his name for the purpose of enabling the real owner to avoid statutory liabilities, since he is not a *bona fide* stockholder, within the meaning of the statute; (Civil Code Cal., § 312.)

In the same case the court also ruled that a written agreement between purchasers of stock in a corporation that they will for five years "retain the power to vote the shares in one body, and that the vote which shall be cast by said shares shall be determined by ballot between them or their survivors," is a proxy, authorizing the vote of all the stock to be cast in accordance with the determination of the majority of the parties thereto; that the fact that the parties stipulated among themselves for such a voting agreement in their contract to purchase the stock is sufficient evidence to support it; that it is immaterial that the voting agreement was not executed until after their bid for the stock was made, when it was executed before they had paid the purchase money; that it was also immaterial that a certificate for part of the stock was issued to each party; and that such an agreement is not against public policy. Beatty, C. J., dissented.

There is an article on the subject of voting trusts, in 35 AM. L. REG. (N. S.) 413.

According to a recent decision of the Supreme Court of Michigan, since the constitution of 1850 reserved to the legislature the right to alter, amend, or repeal any law under which corporations might be formed, a statute providing for representation of minority stockholders in the directory of a corporation, by allowing them to cumulate their votes, is constitutional, as applied to a corporation organized before its passage, but subsequent to the adoption of the constitution, though it changes the method of voting prescribed by its articles of incorporation; the act in question

not being one which deprives the corporation of any substantial right: *Atty.-Gen. v. Looker*, 69 N. W. Rep. 929.

In a late case before the House of Lords, *Salomon v. Salomon & Co., Ltd.*, [1897.] A. C. 22, reversing [1895] 2 Ch.

One Man
Company,
Limited
Liability.
Fraud on
Creditors

323, the appellant, a trader, sold a solvent business to a limited company with a nominal capital of forty thousand shares, the company consisting only of the vendor, his wife, a daughter, and four sons, who subscribed for one share each, the terms of sale being known to and approved by the shareholders. In part payment of the purchase money, debentures forming a floating security were issued to the vendor. These were afterwards called in, and fresh debentures issued to a third person, as security for a loan to the vendor. Twenty thousand shares were also issued to him, and were paid for out of the purchase money. These shares gave the vendor the power of outvoting the other shareholders. No further shares were ever issued. All the requirements of the Companies' Act of 1862 were complied with. The vendor was appointed managing director, bad times came, and the company was wound up, and after satisfying the debentures there would not be enough left to pay the ordinary creditors. The liquidator counterclaimed to a suit on the debentures, alleging that the formation of the company was a fraud on its creditors; but their Lordships held that the proceedings were not contrary to the true meaning of the Companies' Act of 1862; that the company was duly formed and registered, and was not a mere "alias" or agent of or trustee for the vendor; that he was not liable to indemnify the company against the creditors' claims; that no fraud had been practised upon creditors or shareholders; and that neither the company, nor the liquidator suing in its name, was entitled to rescission of the contract of purchase. See 36 AM. L. REG. (N. S.) 18, 161.

When two members of a corporation own the entire stock, and the corporation is indebted to each, but the indebtedness has not been reduced to judgment, neither of them has the right, as a creditor, to ask for the

Rights of
Creditors

appointment of a receiver: *Wallace v. Pierce-Wallace Pub. Co.*, (Supreme Court of Iowa,) 70 N. W. Rep. 216.

In *The Queen v. King*, [1897] 1 Q. B. 214, upon the trial of an indictment for obtaining goods by false pretences, a letter written by the defendant to the prosecutor respecting the goods in question was put into the hands of the prosecutor, who was asked what opinion he formed respecting the occupation or position of the defendant upon the receipt of the letter. Counsel for the defendant objected to this question on the ground that the meaning and construction of the letter was a question for the jury. This objection was overruled; and the question was stated to the Court for Crown Cases Reserved, whether the question and answer were admissible in evidence. That court held, that although the question of the proper inference to be drawn from the letter was for the jury, yet the question was admissible to show the inference of fact drawn from it by the prosecutor.

After his conviction, the defendant was also tried and convicted on an indictment charging him with larceny of the same goods. On the trial it was objected in his behalf that, having been already convicted of having obtained credit by false pretences for the goods mentioned in the indictment, he could not in law be guilty of stealing them. But the trial court overruled this objection, although its reasonableness would seem to be too apparent for argument, and the defendant was convicted. The question of the legality of this conviction was also reserved and the court held it clearly illegal, and quashed it.

A strike of the employees of the charterer, without grievance or warning, and an organized and successful effort on their part to prevent, by threats, intimidation and violence, other laborers, who were willing to do so, from discharging a vessel, will excuse the charterer for a delay in the performance of the work: *Empire Transp.*

C. v. Philadelphia & Reading Coal & Iron Co., (Circuit Court of Appeals, Eighth Circuit,) 77 Fed. Rep. 919.

When a regularly constituted committee has called a convention for the sole purpose of electing delegates to the national party convention, the convention so called has no power to name a new committee without the consent of the electors of the district:

Irchild, (Court of Appeals of New York,) 45 N. E. Rep. 983.

A certificate of nomination by a convention takes precedence a nomination by petition or nomination papers, and

therefore a candidate nominated in the latter way is not entitled to have his name placed on the

the column under the head of his party, in preference

to a candidate nominated by certificate, although the former nomination first. But in such a case, when the statute

provides that all nominations shall be placed under the party designated by them, or if not, under some suitable

nominee by petitions or papers is entitled to have his

placed on the ballot under a suitable title, to be designated by the officers who prepare it: *Lowery v. Davis*, (Supreme Court of Iowa,) 70 N. W. Rep. 190.

According to a recent decision of the Supreme Judicial

of Maine, the ballot law of that state requires the name

of a person not printed on the ballot, but whom some one wishes to vote for, to be inserted in the

blank space left for that purpose; and a sticker placed over

the printed names is not a compliance with the statute:

Watersman v. Cunningham, 36 Atl. Rep. 395.

This is another instance of a strict construction of a remedial statute, which jurists would have us believe is improper.

In the opinion of the Court of Appeals of Maryland, an electric light company is not a manufacturing industry, within the meaning of a city ordinance exempting from municipal taxation the "machinery and manufacturing apparatus of all manufacturing industries,"

Electric Light
Companies,
Manufacturing
Corporations

that ordinance having been passed before the legislature classified such companies in the incorporation laws under the head of manufacturing companies: *Frederick Electric Light & Power Co. v. Mayor of Frederick City*, 36 Atl. Rep. 362.

Where a natural water course is so obstructed by a dam built on a non-resident's land, as to work an injury to a resident owner of adjoining land, a court of equity has jurisdiction to redress the injury: *Gordon v. Warfield*, (Supreme Court of Mississippi,) 21 So. Rep. 151.

A bill in equity may be maintained for the recovery of letters written by the complainant to her son, and by her son to her, when the former were wrongfully taken by defendant from the possession of the son, and the latter from the possession of the complainant: *Dock v. Dock*, (Supreme Court of Pennsylvania,) 36 Atl. Rep. 411.

An entry in the family Bible of one whose life is insured, though made by a person who is not a member of the family, is admissible against the plaintiff in an action on the policy: *Union Central Life Ins. Co. v. Pollard*, (Supreme Court of Appeals of Virginia,) 26 S. E. Rep. 421.

In an action by an architect on a *quantum meruit*, the evidence offered by the plaintiff as to the customary charges of architects for similar services is not rendered incompetent by the defendant showing that those customary charges originated in and conform to a rule established by an association of architects: *Laver v. Hotelling*, (Supreme Court of California,) 47 Pac. Rep. 593. McFarland, J., dissented.

The mere fact that a purchaser gives a check, in payment, on a bank in which he has neither money nor credit, is not a fraudulent representation that he has money or credit there, so as to constitute the offense of swindling: *Brown v. State*, (Court of Criminal Appeals of Texas,) 38 S. W. Rep. 1008.

In order to constitute the offense of forcible entry at common law, and under those statutes which have adopted the common law definition of that crime, the entry must be accompanied by some act of actual violence or terror directed towards the person in possession; and, therefore breaking and entering an unoccupied house in the absence of the person who had previously been in possession and control thereof, and who still claimed the right to the possession, is not an indictable offense: *Lewis v. State*, (Supreme Court of Georgia,) 26 S. E. Rep. 496.

An innkeeper or hotel-keeper is a guarantor for the good conduct of all members of his household, including those engaged in his service, and is liable for thefts committed by them of the property of his guests while asleep in rooms assigned them; and the fact that a guest is intoxicated, or that the door of his room is unlocked, will not relieve the landlord of responsibility: *Cunningham v. Bucky*, (Supreme Court of Appeals of West Virginia,) 26 S. E. Rep. 442.

In *West of England Fire Ins. Co. v. Isaacs*, [1897] 1 Q. B. 226, the Court of Appeal of England has affirmed the decision of Collins, J., [1896] 2 Q. B. 377, holding, as he held, that the insurer can not only recover from the insured the value of any benefit received by him by way of compensation from other sources, but also the full value of any rights or remedies of the insured against third parties which have been renounced by him, and to which, but for that renunciation, the insurer would have had a right to be subrogated.

The right surrendered in this case was a covenant in a lease to lay out insurance moneys received on repairs to the premises insured. See 35 AM. L. REG. (N. S.) 785.

When a lunatic sets fire to a building, an insurance company, which has paid the loss caused thereby, has a right of

**Subrogation,
Insurance
Company,
Fire Caused
by Lunatic** action against the lunatic's estate, under the sub-
rogation clause of the policy, to recover the
amount so paid; and in such an action the insanity
of the defendant cannot be set up as a defense :
Mut. Fire Ins. Co. of Chester Co. v. Showalter, (Superior Court
of Pennsylvania,) 3 Pa. Super. Ct. 452.

**Marine
Insurance,
Policy,
Liability of
Broker for
Premiums** Judge Collins has also recently held that the general rule of
law, based on mercantile custom, by which the broker, and
not the assured, is liable to the underwriters for
the premiums on a policy of marine insurance, is
not limited to the ordinary form of Lloyd's policy,
but extends also to policies containing a promise
on the part of the assured to pay the premiums :
Universe Ins. Co. of Milan v. Merchants Marine Ins Co., [1897]
1 Q. B. 205.

On the trial of an indictment for mutilating and destroying
the books of a corporation with intent to defraud and injure it,
**Jurors,
Competency,
Relationship** persons related to its stockholders within the
prohibited degree are not competent to serve as
jurors; and in determining whether or not a new
trial should be granted to the accused on the ground of
relationship between jurors and stockholders, the fact that the
former, at the time of the trial, were ignorant of any relation-
ship between themselves and some of the stockholders is
immaterial: *McElhannon v. State*, (Supreme Court of Georgia,) 26 S. E. Rep. 501.

In *Sanborn v. First Natl. Bk. of Greeley*, (Court of Appeals
of Colorado,) 47 Pac. Rep. 660, an attempt was made to
**Landlord and
Tenant,
Assignment of
Reversion,
Appurte-
nances** change the location of a post-office: and several
persons occupying property adjacent to its then
location, and wishing it to remain there, agreed to
pay a certain sum annually to the owner of the
premises occupied by it, or his assigns, in con-
sideration that he would lease the premises to the government
for a term of five years at an inadequate rental. The lessor
subsequently assigned all his right, title and interest in the
lease to another; and thereafter assigned all his property for

the benefit of creditors. The assignee brought suit to recover the sum due under the agreement; and the bank contended that the assignment of the lease carried with it the right to receive the annual payments. The lower court found for the defendant on this ground; but the Court of Appeals reversed that decision, holding that the agreement did not create the relation of landlord and tenant, and that therefore the right to receive payments under it did not pass by a conveyance of the premises as appurtenant to the land.

an article addressed to the proprietor of a medicine, published in a newspaper, stating that "Your advertisements will not be received in the columns of the 'Landwirth,' although you offer us big pay. We have really advised our readers that by the manufacture and sale of such medicines the public are swindled out of their money.

'Landwirth' does not work in this way, but, on the contrary, desires to be to its readers a sincere and faithful adviser," is libelous *per se*: *De Shoop Family Medicine Co. v. Wernick*, (Supreme Court of Wisconsin,) 70 N. W. Rep. 160.

In *Comfort v. Young*, 69 N. W. Rep. 1032, the Supreme Court of Iowa recently held, that when an information charging insanity, filed with the board of commissioners of insanity, is not well grounded, the person who filed it is responsible in an action for libel, unless he acted in good faith, and upon probable cause.

There is an article on the question of the imputation of insanity as a cause of action for libel, in 30 AM. L. REG. (N. S.) 389.

In a case lately decided by the House of Lords, *Nevill v. Fine Art & Gen. Ins. Co., Ltd.*, [1897] A. C. 68, affirming [1895] 2 Q. B. 156, the plaintiff had acted for some time as agent of the defendant company at his own offices. After some correspondence as to a change of terms, on which the parties could not agree, the secretary of the defendant sent to persons who insured through the plaintiff a circular stating that the agency of the plaintiff at his offices "had been closed by the directors." The

plaintiff then brought an action for libel against the company. On the trial the judge ruled that the statement was capable of a defamatory meaning, but that the occasion was privileged. The jury found a verdict for the plaintiff, that the statement was a libel, that it was untrue, and that the defendant had exceeded its privilege, but did not find actual malice. Judgment was entered thereon. From this the defendant appealed; and both the Court of Appeal and the House of Lords held that judgment should be given for the company, on the ground that the statement was not capable of a defamatory meaning, that it was true, that the occasion was privileged, that the finding of the jury as to excess of privilege was insufficient, and that there was no evidence of malice for the jury.

The Supreme Court of Iowa, adopting the rule supported by the weight of authority, holds that in an action for malicious prosecution, the fact that the examining magistrate discharged the plaintiff without evidence in his behalf is *prima facie* evidence of want of probable cause, throwing the burden of establishing probable cause on the defendant; and that when the burden of proof is thus cast upon the defendant, it is error to direct a verdict for him: *Hidy v. Murray*, 69 N. W. Rep. 1138.

In a prosecution for a violation of the Factory and Workshop Acts of England of 1878, s. 5, sub-s. 3, and 1891, s. 6, sub-s. 2, which provide that "all dangerous parts of the machinery" in a factory "shall either be securely fenced or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced," the occupier of a cotton factory was summoned before the justices of the borough of Blackburn for neglecting to fence the shuttles of his looms. It appeared that shuttles do occasionally, during the process of weaving, fly out of the shuttle-race, (the bed upon which they slide to and fro,) under circumstances which render them dangerous to any persons

Malicious
Prosecution,
Want of Prob-
able Cause.
Discharge by
Examining
Magistrate

Master and
Servant.
Dangerous
Machinery,
Duty to Fence

who happen to be in the line of flight. The flying out of the shuttles may be caused by the defective condition of the shuttles, the negligence of the weaver in charge of the machine, or by reason of some foreign substance getting accidentally into the shuttle-race, or by a defect in the yarn; but in any case it is of rare occurrence. (In the establishment in question, which contained 1400 looms, but four serious accidents happened from this cause in as many years.) The justices convicted the defendant; but the recorder quashed the conviction on appeal, subject to a case stated for the Queen's Bench Division. That court adopted the conclusion of the justices, holding that the obligation to fence under the act cited was not confined to machinery which was dangerous in itself in the ordinary course of careful working; and that the shuttles, even though not in themselves defective, were "dangerous parts of the machinery," if any of the other enumerated causes of their flying out of the shuttle-race were likely to occur with any degree of frequency; and accordingly remitted the case to the quarter sessions : *Windle v. Birt-whistle*, [1897] 1 Q. B. 192.

The Court of Appeal of England has recently decided a very interesting question in the law of negligence. The defendant employed a man to drive his cart, with instructions not to leave it, and a boy, who had nothing to do with the driving, to go in the cart and deliver parcels to the defendant's customers. The driver left the cart, with the boy in it, and went into a house. While the driver was absent the boy drove on, and came into collision with the plaintiff's carriage. The plaintiff sued the defendant for the damage caused by the collision; and the court held, on appeal, that there is no rule of law that will prevent a master being liable for negligence of his servant, in consequence of which a third person is given opportunity to commit a wrongful or negligent act immediately producing the damage complained of; that it is in each case a question of fact whether the original negligence was an effective cause of the damage; and that in this case the negligence of the driver in leaving the cart was the effective cause of the damage, and

*Negligence of
Servant,
Liability of
Master*

the defendant was liable: *Englehart v. Farrant*, [1897] 1 Q. B. 240.

When a contract provides that the work shall be done under "the immediate supervision" of the architect, and that

Mechanics' payment shall be made on the architect's certificates, the owner is not bound by certificates issued, in the absence of the architect, by one to whom he had attempted to delegate his authority: *Monahan v. Fitzgerald*, (Supreme Court of Illinois,) 45 N. E. Rep. 1013.

Private by-laws of a Masons' and Builders' Association, the membership in which includes sixty out of seventy or seventy-five mason contractors in a city, requiring the

Monopolies, members to pay to the association six per cent. on all contracts taken by them, and to submit all bids for work first to the association, and providing that the lowest bidder shall add six per cent. to his bid before it is submitted to the owner or his architect, are contrary to public policy, and void; and a note given by a building contractor to such an association, of which he was a member, for the percentage due under the by-laws on a contract for building, is invalid, and will not be enforced: *Milwaukee Masons' & Builders' Assn. v. Nieserowski*, (Supreme Court of Wisconsin,) 70 N. W. Rep. 166.

A city, which has authority under its charter to regulate the use of the public streets and highways, can enact an

Municipal ordinance to compel passenger cars operated by trolley or electric power to come to a full stop before crossing intersecting streets; and such an ordinance, if enacted in the manner prescribed by the charter of the city, is legislative in its character, and will not be set aside as unreasonable in its purpose or effect: *Cape May, D. B. & S. P. R. R. Co. v. City of Cape May*, (Supreme Court of New Jersey,) 36 Atl. Rep. 678; *State v. City of Cape May*, (Supreme Court of New Jersey,) 36 Atl. Rep. 679.

Guardians of the poor are not answerable in damages in their corporate capacity for injuries caused by the negligence of their officials in the treatment of poor patients received into workhouse hospitals:

Dunbar v. The Guardians of the Poor of the Ardee Union, (Court of Appeal of Ireland,) [1897] 2 I. R. 76.

In a case recently decided by the Supreme Court of British Columbia, *Canadian Pac. R. R. Co. v. Parke*, 33 Can. L. J.

213, it appeared that the defendants owned a lot of ground near the Thompson River, which they irrigated for agricultural purposes, under statutory authority. Without irrigation the land would

have been worthless. The soil was gravelly and porous, and in consequence of this the water percolated through, causing the land to slip, and thus pushing out of place the rails of the plaintiff's road, which ran between the defendant's land and the river. The plaintiff asked for an injunction to restrain the defendants from causing it further damage by irrigating their land; but this was refused, on the ground that the legislature, in authorizing the bringing of water on the lands for agricultural purposes, must be taken to have contemplated the mischief which might arise from a reasonable use of that power, and to have condoned it.

When a person stands so near to a railroad track that he is drawn under the wheels by the suction of a passing train, the question of his contributory negligence is for the

jury; and it is error for the court to charge, as matter of law, either that he was guilty of contributory negligence, or that he was free from negligence, if he stood far enough from the track to avoid being struck by the train: *Grancy v. St. L., O. M. & S. Ry. Co.*, (Supreme Court of Missouri, Division No. 1,) 38 S. W. Rep. 969.

In *Industrial Bank of Chicago v. Bowes*, 46 N. E. Rep. 10, the Supreme Court of Illinois lately ruled, reversing 64 Ill.

App. 300, that an architect's certificate, reciting that a certain amount was due the contractor, and indorsed by the owner with an order to a firm that had loaned him money wherewith to carry

on the building, the funds loaned remaining in the hands of the lender, to be paid out as required in the construction of the building, was a cheque, and not a bill of exchange.

In a recent case in the House of Lords, *Clutton v. Attenborough*, [1897] A. C. 90, a clerk in the account department

Cheques of the plaintiffs, by fraudulently representing to them that work had been done on their account by B., induced them to draw cheques payable to the order of B., in payment for the pretended work. There was in fact no such person as B. The cheques, when signed by the plaintiffs were sent by them to the account department for postage. The clerk obtained possession of the cheques, indorsed them in B.'s name, and negotiated them with the defendants, who gave value for them in good faith. The cheques were paid to the defendants by the plaintiffs' bankers. After the plaintiffs discovered the fraud they sued the defendants to recover the amount of the cheques as money paid under mistake of fact. Upon these facts their Lordships held, affirming the decision of the Court of Appeal, [1895] 2 Q. B. 707, which affirmed that of Wills, J., [1895] 2 Q. B. 303, that the cheques were "issued" within the meaning of the Bills of Exchange Act, 1882, s. 2; that B. was a "fictitious or non-existing person" within the meaning of s. 7, sub-s. 3 of that act, which provides that "where the payee is a fictitious or non-existent person, the bill may be treated as payable to bearer," although the plaintiffs believed and intended the cheques to be payable to the order of a real person; that the cheques might therefore be treated as payable to bearer; and that the plaintiffs could not maintain their action, as the defendants were holders in good faith and for value.

In *Ogston v. Aberdeen District Tramways Co.*, [1897] A. C.

Nuisance, 111, the House of Lords recently decided that a street railway company, which after each heavy fall of snow cleared its tracks by a snow-plow and then scattered salt along the rails and adjacent thereto, but did not remove the briny slush thus produced, should be enjoined from continuing the practice.

The Supreme Court of Texas holds, that, independent of statute, equity has jurisdiction to order property to be sold for partition, when found incapable of division in kind without serious injury to the interests of the parties: *Moore v. Blagge*, 38 S. W. Rep. 979.

In *Potts v. Schmucker*, (Court of Appeals of Maryland,) 36 Atl. Rep. 592, a member of a banking firm engaged in another business under a corporate name, owning all the stock himself, except four shares. He conducted the business, and owned all the assets of the concern. The corporation was indebted to the bank for money lent. The bank became insolvent, and the corporation went into the hands of a receiver. Under the circumstances it was held, that as the owner of the corporation was a member of the bank, the latter was not entitled to share in the assets of the corporation until its other creditors had been paid.

The Supreme Court of Ohio has lately, in accord with the authorities, upheld the validity of the release of liability for injuries given by the members of a railroad relief department. The facts were as follows: The plaintiff, an employe of the company, voluntarily, and with full knowledge of the character and effect of the contract he was assuming, applied for admission to a voluntary relief association, of which the company was a member, contributing large sums to its treasury. His application contained an agreement that the company might deduct from his wages a specified sum per month, in order to form, with other like contributions of the other members, and certain contributions which the company bound itself to make, a relief fund for the benefit of the employe members in case of sickness, accident, or death; and a further agreement that in case of accident the acceptance by him of relief from the relief fund so accumulated should operate as a release of the company from liability for damages. The court held (1) That such a contract is not prohibited by

the act of Ohio of April 2, 1890, (87 Ohio Laws, 149,) which provides that "no railroad company, insurance society or association or any other person shall demand, accept, require or enter into any contract, agreement, stipulation with any person about to enter or in the employ of any railroad company, whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company, thereafter arising for injury or death, or whereby he agrees to surrender or waive in case he asserts the same, any other right whatsoever," since the contract in question does not waive any right, but expressly reserves it, merely giving the plaintiff an election of remedies after the injury, and providing that the choice of one shall be a waiver of the other ; (2) That such a contract is not contrary to public policy ; (3) That it does not lack mutuality ; and (4) That it is based upon a valid consideration : *Pittsburgh, C., C. & St. L. Ry. Co. v. Cox*, 45 N. E. Rep. 641. See 34 AM. L. REG. N. S. 231.

According to a recent decision of the Supreme Court of California, a person who receives compensation for reporting an offense cannot thereafter procure the conviction of the offender, and claim for that service a reward offered for the "arrest and conviction" of such offender, since the reward cannot be apportioned, and the acceptance of pay for the detection defeats a recovery for the conviction: *Van Horn v. Ricks Water Co.*, 47 Pac. Rep. 361.

In United States v. Harris, (Circuit Court of Appeals, Seventh Circuit,) 77 Fed. Rep. 821, it appeared that one Harris was arrested upon a charge of obtaining money from postmasters upon forged money orders, and was convicted on that charge. While in custody, before conviction, he was searched by a post-office inspector, and a sum of money was taken from his person, which was afterwards deposited in the treasury of the United States. Harris sued the government to recover the money so taken. The court below ruled that

Reward,
Apportion-
ment

Set-Off,
United States
Government,
Money
Fraudulently
Obtained from
Postmaster

he was entitled to recover, but the Circuit Court of Appeals reversed this decision in part, declaring that although the money taken from Harris was not identified as the same money obtained by his forgeries, and although the postmasters, and not the government, were responsible for the money paid on the forged orders, the government could claim as a set-off to the plaintiff's demand, the amount of any moneys clearly shown to have been fraudulently obtained by him from the postmasters.

The Supreme Court of Texas has declared that the doctrine of *stare decisis* does not require that a prior decision, in contravention of the constitution, should be followed; and that the decision of a court is not "a law" within the meaning of the provision of the United States constitution which prohibits the states from passing any law impairing the obligations of contracts, so that the subsequent overruling of a decision, in reliance whereon contracts have been made, does not violate that provision: *Storrie v. Cortes*, 38 S. W. Rep. 154.

In *Shields v. Howard*, [1897] 1 Q. B. 84, Judge Grantham, of the Queen's Bench Division, lately held, that under the act of 27 & 28 Vict. c. 55, § 1, which provides that "any householder within the metropolitan district, . . . may require any street musician or street singer to depart from the neighborhood of the house of such householder on account of the illness or on account of the interruption of the ordinary occupations or pursuits of any inmate of such house, or for other reasonable or sufficient cause," and imposes a penalty for refusal to depart when so required, the householder making the requisition must give to the street musician or singer his reasons for making it.

The Court of Appeals of New York has recently delivered itself of an opinion which will prove of great interest to the

Street
Railroad,
Fare,
Tender,
Reasonable-
ness

public, involving, as it does, the disputed question of the reasonableness of a tender of fare on a street-car. The plaintiff had in his possession no smaller amount of money than a five-dollar bill.

He tendered this to the conductor, who said, "I am not supposed to change it; you must get off." The plaintiff replied, "I won't get off. You must put me off." The conductor did so, using no unnecessary violence; and the plaintiff sued for damages for the technical assault. It was agreed that the defendant had a rule, (not brought to the plaintiff's notice,) requiring conductors to furnish change to the amount of two dollars, but that there was no rule forbidding conductors to make change for a larger amount. There was no evidence of a custom on the part of plaintiff or of the public of tendering to the defendant five dollars in payment of a five cent fare, and receiving the change, but the plaintiff testified that on a former occasion, and on another line, he had offered a five-dollar bill for his fare, and that it had been changed for him. Upon this state of facts, the court held that the tender was unreasonable, as a matter of law, and that the plaintiff could not recover: *Barker v. Central Park N. & E. R. R. Co.*, 45 N. E. Rep. 550.

Electric Cars,
Contributory
Negligence

It is a question for the jury whether a passenger, who, in the absence of a rule forbidding it, rides on the front platform of an electric car, as he and others have been accustomed to ride, and where his fare is taken without objection, is guilty of such negligence as to preclude his recovery for injuries received in a collision with another car: *Bailey v. Tacoma Traction Co.*, (Supreme Court of Washington,) 47 Pac. Rep. 241.

Alighting
Passengers
Crossing
Tracks

The Court of Appeals of Maryland has joined the ranks of those who hold that when a passenger alights from a street car, and in attempting to cross the street behind it is struck by a car coming up on the other track, which he might have seen if he had looked, he is guilty of contributory negligence which will bar his recovering for injuries received: *Baltimore Traction Co v Helms*, 36 Atl. Rep. 119. The court is very careful to-

cite all the authorities supporting its view, but ignores those which hold a contrary doctrine. See 35 AM. L. REG. (N. S.) 532, 794.

Owners of a linotype machine, with which they make linotypes for the publication of newspapers or books, are not manufacturers of machinery, so as to be exempt from taxation under a constitutional provision exempting such manufacturers: *Nicholson v. Board of Assessors*, (Supreme Court of Louisiana,) 21 So. Rep. 167.

Two persons unlawfully racing their horses together on a street are jointly liable to a third person who attempts to cross in front of them, and without fault on his part is run against and injured by one of them, if, but for the race, there would have been no accident: *Hanrahan v. Cochran*, (Supreme Court of New York, Appellate Division, Fourth Department,) 42 N. Y. Suppl. 1031.

The same court has lately held, that a wife, who has been decreed alimony, pending divorce proceedings, can maintain an action against one who has induced and aided her husband to leave the state, in order to avoid the payment of the alimony, as to which he was then in default: *Hoefer v. Hoefer*, 42 N. Y. Suppl. 1035.

In a recent suit in a federal court to restrain the defendant from selling goods in packages similar to those of the complainant, where the defendant's packages resembled those of the complainant in numerous particulars besides those of size, color and form, it was held that an injunction should be granted restraining the sale of that particular form of package, or any other form which, by reason of the collocation of size, shape, color, lettering, spacing and ornamentation, might present a general appearance as closely resembling complainant's packages as the

one complained of, but that a clause should be added to the effect that the injunction should not be construed as preventing the sale of packages of the size, weight, shape or color of complainant's package, provided that they were so differentiated in general appearance as not to be calculated to deceive the ordinary purchaser: *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, (Circuit Court of Appeals, Second Circuit,) 77 Fed. Rep. 869.

This case stands in marked contrast to that of *Lafean v. Weeks*, 177 Pa. 412. 36 AM. L. REG. (N. S.).

The rule permitting the owner of a fund, which has been misappropriated by one who held it in trust or for a specific purpose, to follow the trust property into the hands of the trustee, or of a receiver, in case of insolvency, only permits the owner to pursue the fund in kind, or in specific property into which it has been converted, or, if the fund has been mingled with other property of the trustee, to establish a charge on the mass of that property for the amount of such fund, and does not give the owner of the fund any rights, in preference to other creditors of the trustee, in property into which the trust fund has in no way entered: *Met. Nat. Bk. of Kansas City, Mo. v. Campbell Commission Co.*, (Circuit Court, W. D. Missouri, W. D.,) 77 Fed. Rep. 705.

When the income of a fund bequeathed by a testator is, by the terms of the will, to be "deposited" in the hands of his executors for the benefit of his daughter during her life, to be invested, and the income paid over to her, without any provision against anticipation or alienation, the fact that it is stated to be "for her support" will not make it a spendthrift trust, and the same will be subject to the payment of her debts: *Young v. Easley*, (Supreme Court of Appeals of Virginia,) 26 S. E. Rep. 401.

According to a recent decision of the Court of Civil Appeals of Texas, *Lottman Bros. Mfg. Co. v. Houston Waterworks Co.*,

Water
Companies,
Liability for
Failure to
Furnish
Water

38 S. W. Rep. 357, a water company which has contracted to supply a private corporation with water in case of a fire, in consideration of an annual rental, is liable for its failure to do so to the extent of such damage as may be proved to arise from such failure as the proximate cause.

Waters and
Water-
courses,
Diversion of
Spring

When the water of a spring flows through a definite channel, or by percolation, into a running stream, of which it is the chief source of supply, an injunction will lie at the suit of a prior appropriator of the water rights in that stream, to restrain a diversion of the water of the spring by the owner of the land on which it is situated: *Bruening v. Dorr*, (Supreme Court of Colorado,) 47 Pac. Rep. 290.

Waters and
Watercourses,
Percolating
Waters,
Marshy
Ground

In *M'Nab v. Robertson*, [1897] A. C. 129, the House of Lords lately held, affirming 33 S. L. R. 497, that the waters of a spring, which do not flow in a defined stream, but ooze through marshy ground into a pond, are percolating waters; and that a grant of "the waters in the said pond, and in the streams leading thereto" would not preclude the grantor from drawing off from this marshy ground the water of the above-mentioned spring.

Conditional
Wills

The Probate Division of England has recently decided two important cases in respect of testamentary documents. In the first case, *In the Goods of Spratt*, [1897] P. 28, the deceased, a military officer in active service in New Zealand, in 1864 wrote to his sister a letter, of which the material part is as follows: "If we remain here taking pains for some time to come the chances are in favor of some more of us being killed, and as I may not have another opportunity of saying what I wish to be done with any little money I may possess in case of an accident, I wish to make everything I possess over to you. In the first place, there is money at . . . Keep this until I ask you for it." The testator

survived the war, and died in 1896, not having revoked the disposition made in this letter. The next of kin urged that this was to be regarded as a conditional will, and therefore revoked by his survival; but the court held that the disposition of the deceased's property, according to the terms of the letter, was not dependent on his death while in active service; that the letter was therefore not a conditional will; and being a good military will, was entitled to probate.

In the other case, *Halford v. Halford*, [1897] P. 36, the testator, a Scotchman, by his will gave the residue of his estate to his wife for life during her widowhood, and in case of her re-marriage gave her one-third for life, the remainder to various legatees. There was no disposition of the residue in the event of her remaining a widow. Subsequently, being about to sail with his wife from Calcutta to England, the testator wrote a letter to his brother in England, which was in form a good testamentary document at Scotch law, and contained the following language: "If anything happens to us on the way, my will has been accidentally packed away in a tin box, to which I cannot now get access, as I forget which box it has been put into. However, if we both come to grief, I appoint you my executor; if I only, then in conjunction with Nan." The letter then went on to deal with the disposition of his estate after his wife's death, in the event of her surviving him. Neither the testator nor his wife died during the voyage. It was argued that this will also was conditional, and revoked by the safe arrival of the testator; but the court held that it was a valid testamentary document, and admitted it to probate as such.

Ardemus Stewart.

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PERPETUITIES. The Rule against Perpetuities is not often brought to the attention of the attorney, but the questions arising under it are sometimes of great importance, as witness the attacks on the Girard and Franklin bequests, and the recent case of *Pulitzer v. Livingston*, in Maine, 36 Atl. Rep. 635 (1897).

Pulitzer v. Livingston was an action brought for an alleged breach of a special covenant that the grantors in certain deeds of trust had remaining in them no title which could be maintained against the title conveyed to the plaintiff by the grantees. The plaintiff claimed that these deeds of trust were not legally sufficient to divest the grantors of their title in the property, that there were future estates and interests so limited therein that they offend against those rules of law which prescribe and limit the period within which future

estates and interests must necessarily vest, and that these deeds being void no title ever passed to the trustees but still remains in the grantors, or their heirs or assigns.

The facts were these: William Bingham, of Philadelphia, and United States Senator from Pennsylvania, in the last century, was the owner of very large landed estates, including over two million acres in Maine alone. In 1853, his heirs were so numerous and so scattered that it was not feasible for them to make conveyances directly or to act through agents appointed by letter of attorney; deeds of conveyance in trust were therefore executed to Joseph R. Ingersoll, then the American Minister to England and one of the most distinguished members of the old Bar of Philadelphia, and John Craig Miller, as trustees. The trustees were empowered, *inter alia*, (1) to let, demise and mortgage the real estate and invest and reinvest the personal estate; (2) to collect and receive the rents and income of the real estate and the income from the personal estate under their control; (3) to remit the net income to the grantors or apply and dispose of the same as the grantors or their representatives might direct; (4) to appoint successors in the trust. The power was expressly reserved to the grantors and their legal representatives, at any time, to alter or revoke the trusts as to their respective shares. From this it appears that the beneficial enjoyment of the estate is absolutely and unqualifiedly vested in the original holders of the legal title or their representatives, with full power of sale and disposition; that the trustees have, during the continuance of the trust, the fullest powers of sale and conveyance; and that all the *cestuis que trustent*, as to the whole, or each, as to his own purpart, may change or terminate the trust and require a conveyance of the legal estate.

The terms of this trust have been set forth at some length, as it involves property-rights of unusual magnitude, and the case is one that may well become an important authority. It is of interest, too, from its involving the soundness of the reasoning in *Slade v. Patten*, 68 Me. 380. This last case, it may be recalled, is one of four in the United States criticised in *Gray on the Rule against Perpetuities* (Sections 235-6) as in "conflict with the fundamental principles which govern questions of remoteness."

Pulitzer v. Livingston was very fully argued and elaborate briefs were submitted, especially on behalf of the defendant. The text-books—Marsden, Lewis and Gray—were cited at length, and all the available decisions brought to the attention of the court. The

opinion is full and clear. It recognizes distinctly the essential difference, so often overlooked, in the uses of the word "perpetuity"—now, strictly, with reference to remoteness of vesting, and again, more loosely, with reference to a perpetual prevention of alienation or restraint upon it. The two uses are well shown in such cases as *Phila. delphia v. Girard's Heirs*, 45 Pa. 26, and *Fosdick v. Fosdick*, 6 Allen 41, which are referred to in the opinion. In the judgment of the court the deeds of trust in this case do not offend against either the Rule against Perpetuities or the Rule against Restraints on Alienation. All the interests, whether legal or equitable, are vested and all are freely alienable. The very purpose, indeed, of the trusts was to promote the alienability of the subject-matter. The fact that they may continue indefinitely does not militate against them, for a legal fee is indeterminate, as well as is an equitable one, and the same rule applies to one as to the other.

The power of revocation reserved to the grantors is relied upon by the court as a further and conclusive ground for sustaining the trust. This destructibility of the estate, at the will of the present owner alone, reduces all the future interests contained therein to the level of present estates and is by itself sufficient to prevent their being obnoxious to the Rule against Perpetuities.

The objection to the indefinite duration of the trustees' power to sell is answered in the same way:—"It is true that if an unlimited indestructible power to sell exists, it does restrain free alienation by the one who, subject to that power, is the owner of the fee," and thus offend against the Rule against Restraints on Alienation. But the right reserved to destroy the power renders the power valid, although in terms perpetual: 2 Sugd. Pow. 472.

This brings the court to a discussion of the case of *Slade v. Patten*, 68 Me. 380, already mentioned. Here there was no reservation of a power of revocation—"a most important difference." The reasons given for the decision are severely criticised and the ground upon which it is apparently based, viz., "that a trust which will not or may not terminate within lives in being and years and a fraction afterwards is void as creating a perpetuity," is declared incorrect and not to be sustained on principle. It is pointed out, however, that the judgment was in the court then adverts to the cases in *Maryland* which disapprove of the reasoning in *Slade v. Patten* and disapproval of them.

This decision of the Supreme Court of Maine

important as it effectually discards the former opinion of the same court, which had been generally recognized as anomalous, and thus tends to restore a substantial unanimity of view upon this subject. The opinion in which this is done is so well reasoned and amply supported by authority and the interests involved were of such importance, that we may fairly expect *Pulitzer v. Livingston* to take rank as a leading case in this difficult branch of the law.

ACCIDENT INSURANCE. In the *Travelers Insurance Company of Hartford v. W. M. Randolph, Executor*, not yet reported, the action was upon policies of insurance issued to one Mitchell, by the insurance company. The policy exempted the company for injuries caused by "voluntary exposure to danger," on the part of the insured. The defence set up that Mitchell voluntarily exposed himself to unnecessary danger by riding upon the steps of a railroad car while the train was proceeding at the rate of twenty-five miles an hour, and that having fallen thence and been killed, the plaintiff (his executor) could not maintain an action upon the policy. The defendant moved for a peremptory instruction in his favor, which was refused, and a verdict found for the plaintiff. On appeal, Mr. Justice Harlan, delivering the opinion of the court, in affirming a judgment for the plaintiff, said:

"But the defendant's motive for a peremptory instruction distinctly presented the question, whether riding upon the platform of a car running fifteen to twenty-five or thirty miles an hour, even if the passenger while so riding holds to a railing, and thereby diminishes the danger of being thrown from the car, was, within the meaning of the policy and *as matter of law* a voluntary exposure of himself to unnecessary danger.

"The words 'voluntary exposure to unnecessary danger,' literally interpreted, would embrace every exposure of the assured not actually required by the circumstances of his situation or enforced by the superior will of others, as well as every danger attending such exposure, that might have been avoided by the exercise of care and diligence upon his part. But the same words may be fairly interpreted as referring only to dangers of a real substantive character, which the insured recognized, but to which he, nevertheless, purposely and cautiously exposed himself, intending at the time to assume all the risks of the situation. The latter interpretation is most favorable to the assured, does no violence to the words used, is consistent with the object of accident insurance

contracts, and is, therefore, the interpretation which the court should adopt."

The action of deceased, although unnecessary, was not in itself, and as a *matter of law*, a voluntary exposure to danger within the meaning of the contract.

The court further said: "The contract in suit covers the injury or death of the assured from *all* external causes and accidental means. Bodily injury or death resulting from the carelessness of the assured is not excepted from the contract." The negligence of the deceased was insured against, as well as other causes of injury or death.

WILL—LATENT AMBIGUITY. In *Wimpole's Estate*, 3 Pa. Superior Ct. 414, the testator left a will containing the following residuary clause: "I give and bequeath the remainder of my estate, if any, to the Trumbauersville Church, to be used for the general benefit of said church." Two religious bodies claimed the benefit of this clause.

Christ's Evangelical Lutheran Church of Trumbauersville and the German Reformed Church of Trumbauersville, both incorporated bodies, owned their church building in common, and both bodies used it as a house of worship, pursuant to a written agreement which contained, *inter alia*, the following: While the congregations have unitedly contributed in church building, etc., it is therefore decided that both shall have equal rights and privileges of the same. Each congregation is entitled to one-half of the time for use of the church, alternately, one Sunday after the other. In case of funerals, the one first announced through the church bell shall have first privileges. The cemetery is free for every regular member of either congregation to bury therein. Those that are not members or have not contributed to their support within two years, and wish to bury in this cemetery, must pay from two to five dollars *per* grave, according to its size. The money thus accumulating shall be for the *mutual benefit of both congregations*.

In the lower court it was held (17 C. C. R. 597) that the legacy should go to two bodies in possession and control of the Trumbauersville Church building as trustees. Christ's Evangelical Lutheran Church appealed from the decree on the ground that there was a latent ambiguity, and that therefore evidence dehors the will should be admitted to explain the terms used. The Appellate Court reversed the decree.

It is a settled doctrine that as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such ambiguity may arise upon a will either when it names a person as the object of a gift or a thing as the subject of it, and there are two persons or things that answer such name or description ; or, secondly, it may arise when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator : *Patch v. White*, 117 U. S. 210-227. In this case there is undoubtedly in existence such an object as the Trumbauersville Church. The term *church* is applied, especially in country districts, to a building and appointments used for religious purposes quite as frequently as to a religious body or organization. The Trumbauersville Church could have been a legatee or devisee, for the bequest could have been received by the whole body as an unincorporated association or society to hold it upon a trust, as for charitable purposes : *Tucker et al. v. Seamen's Aid Society et al.*, 7 Metc. 188.

In the face of these considerations it appears somewhat doubtful that any ambiguity existed as to the meaning of the disputed terms, and it is submitted that it was improper to allow the introduction of extrinsic evidence.

BOOK REVIEWS.

A TREATISE ON THE LAW OF FIRE INSURANCE. By D. OSTRANDER.
Second Edition ; revised and enlarged. St. Paul, Minn. : West
Publishing Co. 1897.

In this treatise the contract of fire insurance and its incidents are thoroughly considered, and presented in conjunction with references to the American cases. To the first edition of five years since, five chapters and a thousand new cases have been added, which increases the volume to one of about eight hundred and fifty pages. The names and citations of the cases are now given at the bottoms of the pages, and lengthy extracts from judicial opinions are occasionally to be found in foot-notes.

The new chapters are entitled Fixtures, Location of Risk, Increase of Hazard, Concerning Liability of Water Supply Companies, and Bailment and Carrier. The chapters treating the important subjects of Subrogation, Warranties and Representations, and Waiver and Estoppel appear to be unusually well given.

The method which has been pursued of giving the law as extracted from cases with general discussion, and the addition of a section at the end of each chapter embodying the conclusions of law makes this a good text book for the student as well as an excellent working one for the lawyer.

D. P. H.

THE DEVELOPMENT OF CODE PLEADING. By CHARLES M. HEPBURN,
of the Cincinnati Bar. Cincinnati : W. H. Anderson & Co.
1897.

The urgent, long-felt need of a simple, expeditious and practical system of pleading, led the legislature of New York, in 1848, to pass a "Code of Procedure," with the object of establishing a single form of action for the enforcement or protection of private rights whether legal or equitable. The further purposes of the Act were, the substitution of concise statements (of the decisive facts of a cause) for the technical and multifarious pleadings of the former system, and the granting of authority to the court for bringing in all parties necessary to the determination of the proceeding.

Since that time England, a number of the British Colonies, and twenty-six of the states of the Union, have taken similar measures to procure like results. Other states have been contented with a modification of the Common Law system ; but in all jurisdictions attempts have been made to do away with what are generally considered the objectionable features of pleadings at the Common Law.

In view of the varying success attending these endeavors, and of the still unsettled state of opinion as to the best method of obtaining the desired end, Mr. Hepburn has written a very interesting history of ancient pleadings and has analyzed the causes which led to the repudiation of the Common Law system; following this with a comparison of the codes as adopted both in this country and in the British Empire. The object of the author appears to have been to point out the essential elements of any system of code pleading with the hope of aiding in the "progress towards a more simple, uniform and durable American Code." Such a work is both original, and valuable to those interested in the study of the law as a science.

Viewing the subject historically, Mr. Hepburn points out that while originally pleadings were in the simplest possible form, a change soon occurred for the worse, the allegations becoming so verbose and multifarious as to be almost unintelligible in many instances. The substantive law so outgrew the law of procedure (owing to the conservativeness of bench and bar, and the neglect of Parliament) that one could no longer be administered under the forms of the other. In spite of the exemplary maxim of the Common Law "*ubi jus, ibi remedium*" the actual conditions were rather "*ubi remedium, ibi jus*." "The formulary system of the year 1300 was in the main the final system of Common Law procedure in England and America." In order to arrive at justifiable results a recourse was had to legal fictions, and to the expansion of equitable jurisdiction. The development of the law was contorted.

The characteristics common to all the codes are thus summarized:

(1) They have all arisen out of the English Common Law procedure, though distinct from and sometimes antagonistic to it.
 (2) They all provide for the following: (a) "a single judicial instrument—a single form of action"—for the protection of all primary rights whether legal or equitable; (b) a limited pleading characterized by plain and concise statements of the substantive facts, and none but the substantive facts of the cause of action; (c) the bringing in of new parties, and the joinder of different causes of action between the necessary parties with a view to the complete determination of the whole controversy; (d) the adjustment of the relief according to the substantive rights, pleaded and proven of all the parties before the court, and of each of them be they few or many."

The New York Code of 1848 was experimental, and hastily adopted, but succeeded in giving the impulse to the reform movement which swept over the United States and the Empire of Great Britain. Final results have nowhere been reached, though England acting with deliberation and bearing in mind the results obtained by the American Codes and noting their shortcomings, has wrought perhaps more lastingly than they. Mr. Hepburn has pointed out the desirable course of future development, and has placed the whole subject upon a scientific basis.

M. L., Jr.

ANOMALIES AND CURIOSITIES OF MEDICINE. Being an Encyclopedic Collection of Rare and Extraordinary cases, and of the most Striking Instances of Abnormity in all Branches of Medicine and Surgery, derived from An Exhaustive Research of Medical Literature, from its Origin to the Present Day, Abstracted, Classified, Annotated, and Indexed. By GEORGE M. GOULD, A.M., M.D., and WALTER L. PYLE, A.M., M.D. Philadelphia: W. R. Saunders. 1897.

"It seems a curious fact," says the preface, "that there has never been any systematic gathering of medical curiosities. . . . The foregoing volume appears to be the first thorough attempt to classify and epitomize the literature of this nature. It has been our purpose to briefly summarize and to arrange in order the records of the most curious, bizarre, and abnormal cases that are found in medical literature of all ages and all languages—a *thaumatographia medica*." This work is evidently the result of a vast amount of research, "medical literature of all ages and all languages having been carefully searched." The authors have included, as a rule, only such cases, anomalous in general or special points, as they believe to be authentic, and show considerable discrimination in determining the credibility of the various alleged abnormalities. Obviously such a work has its value from the medico-legal point of view, especially where, as here, the contents are systematically arranged, and there is in addition to a general index, containing numerous cross-references to the subject discussed, a convenient bibliographical index and a Table of Contents. The work contains 968 pages, 54 of which are devoted to the Indexes, and is profusely illustrated.

W. C. D., Jr.

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TREATISES.

COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, HISTORICAL AND JURIDICAL. By ROGER FOSTER. Three Volumes. Vol. I. Boston: The Boston Book Co. 1895.

AMERICAN RAILROAD AND CORPORATION REPORTS. Edited by JOHN LEWIS. Vol. XII. Chicago: H. B. Myers & Co. 1896.

THE ELEMENTS OF JURISPRUDENCE. By THOMAS ERSKINE HOLLAND, D.C.L. Eighth Edition. Revised. New York: The MacMillan Co. 1896.

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DONATIO MORTIS CAUSA OF ONE'S OWN CHECK.

II. *Checks on Particular Funds.* Where a merchant gives a draft or bill of exchange, it is founded more or less on his general credit. This is so, even though the drawee may be possessed of funds or property of the drawer. The draft is not good against the drawee until accepted.

An order, on the other hand, is addressed with respect to a particular fund or indebtedness, and derives no force from the drawer's general responsibility. Excepting as modified by rights of innocent third parties who have given prior notice, it is valid, although the drawee has not been notified, or though he refuses to accept it.¹

¹ The opinion of Kent, J., in *Cruger v. Armstrong*, 3 John. Cas. 5, 8, is often referred to in this connection: "Checks are, substantially, the same as inland bills, and are negotiable like inland bills payable to bearer. (Chitty, 16, 17, 109, *et passim*.) Lord Kenyon, in a late case (*Boehm and others v. Sterling and others*, 7 Term Rep. 423) said, he was satisfied there was no distinction between checks and bills; and in that case the check was declared upon as a bill of exchange, and so it was, also, in the case of *Grant v. Vaughan*, 3 Burr. 1516, 1 Bl. Rep. 485, in which it is called a "cash note or bill."

The question before Judge Kent was whether the check-holder was bound to exercise proper diligence in presenting the check to the bank.

And see *Harker v. Anderson*, 21 Wend. (N. Y.) 372, 1849.

It is decided by a preponderance of authority that an ordinary bank check is not an assignment, either at law or in equity. Drawn on an active, changing account which is large one day and, perhaps, small the next, the check cannot be regarded as addressed to any particular fund, and it is therefore more a promise that the check shall be honored when presented than that any certain funds shall respond to it. Moreover, a check-holder has no status against the bank, because the bank did not contract with him, and it shall not be held on a contract into which it did not enter. A bank, like any other debtor, assumes but the one responsibility, to the depositor; and cannot be exposed to as many suits as there are checks against the deposit. This is a reason which regards rather the bank than the drawer of the check. Where the bank account has ceased to be an active one, the safety of the banking business does not require that the check shall be denied any force as an assignment; and if, in such a case, at least, it appear that the intention was to transfer either the deposit or even a part of it, equity will recognize the assignment.

There have been quite a number of adjudications to this effect, and they have just received the confirmation and support of the Supreme Court of the United States, in *Fourth Street Bank v. Yardley*, 165 U. S. 634. The Keystone National Bank of Philadelphia applied to the Fourth Street Bank for \$25,000 of gold certificates, for which the Keystone Bank was to give its check against its reserve account in the Tradesmen's National Bank of New York City. The two banks, although located in the same city, had had no commercial transactions between each other, and in that respect had been strangers to each other. The application was explained by the statement by the Keystone Bank to the Fourth Street Bank that the Keystone owed a balance at the clearing-house which it could not meet because its funds were in the City of New York; and the Keystone Bank exhibited a memorandum showing the amount of its credit with the Tradesmen's Bank to be in the neighborhood of \$27,000. The certificates applied for were given and the Keystone's check on the

Tradesmen's Bank for \$25,000 was delivered to the Fourth Street Bank. The check was forwarded at once, and was presented at the Tradesmen's Bank on the following morning, when payment was refused on the ground that there were not funds to the amount of the check. Later in the day, the Keystone Bank was closed by Government. At the time of the presentment of the check, the Keystone had with the Tradesmen's Bank \$19,725.62 in cash, and collection items amounting to \$7181.70, in all \$26,907.32. Of this amount, \$18,056.21 had been remitted by the Keystone Bank on the day previous. Mr. Justice White said: "Had the transaction been an ordinary one, that of a time or even demand loan made with a person in good credit in the line of its business, and not, as it was, an extraordinary transaction, we might well presuppose that it was the expectation of the Fourth Street Bank that the borrower should merely have on hand with the Tradesmen's Bank when the check was presented a sufficient amount to pay it. But the Keystone Bank, in disclosing its hazardous situation and indicating the specific fund dedicated to the payment of the solicited accommodations, did not represent that it expected to further check against the Tradesmen's Bank before the check which it proposed to give might be presented. The statements made clearly implied to the contrary, exhibiting as they did the embarrassment of the borrowing bank, arising from the need of available cash to meet its clearings, and proposing a transaction by which the Fourth Street Bank would obtain from a bank, but a few hours distant, the prompt and certain payment of its advance." The court accordingly held that the intention of the parties was that the check, although drawn generally, should be paid out of a particular fund; and that it must therefore be treated as though an order for payment out of a specific, designated amount. The Fourth Street Bank accordingly was held by a divided court, to be entitled to demand the full amount of \$25,000 from the receiver of the Keystone Bank, to whom the amount had been paid by the Tradesmen's Bank.

The citations by Mr. Justice White fully sustain the principle laid down, that where the intent of the parties is that the

check shall operate as an equitable assignment of a specific fund, it shall work such effect.

Risley v. Phenix Bank, 83 N. Y. 318, was as follows: "The Phenix Bank, prior to May 20, 1861, was the correspondent in the city of New York of the Bank of Georgetown, a banking corporation located at Georgetown, South Carolina; and on that date there was on its books a credit to the Bank of Georgetown to the amount of about \$18,000, derived from deposits and collections, which sum was then owing by the Phenix Bank to the Bank of Georgetown. The plaintiff was a resident of Georgetown, and had dealings with the Bank of Georgetown. He was examined on the trial as a witness in his own behalf, and testified in substance that on the day when the check was dated, the president of the bank stated to him that the bank had a claim of \$17,000 or \$18,000 against the Phenix Bank, and offered to sell it to the plaintiff, stating as a reason, that he, the president, was afraid it might be lost during the war, and that he was unwilling to carry the risk; that the plaintiff offered to purchase the claim at fifty cents on the dollar, which offer was declined, and the president then offered to sell it for Southern bank bills at par; that the plaintiff then offered, if the bank would divide the claim, to purchase \$10,000 of it, upon the terms proposed, which offer was accepted, and the plaintiff thereupon paid the \$10,000; that the question arose as to what kind of a transfer should be given, and the president of the bank said he would give the plaintiff an order on the Phenix Bank for the amount, and thereupon gave the plaintiff the check before referred to, and this completed the transaction between the plaintiff and the Bank of Georgetown." *Held*, an assignment enforceable against the Phenix Bank for the amount of the check.

Risley v. Phenix Bank was followed by *Coates v. First Nat. Bank*, 91 N. Y. 26. The Emporia Bank claimed to be entitled to a part of a balance of a deposit, under the following circumstances: The Mastin Bank had deposits with Donnell, Lawson & Co., in New York city. There had been a custom between the various parties by which the Mastin Bank would assign its credit to be transferred to any bank desired

to the name of the Emporia Bank. On the occasion in question, being indebted to the Emporia Bank, the Mastin Bank was requested to transfer on account thereof \$5000 of the funds to the credit of the Mastin Bank with Donnell, Lawson & Co. They replied that they would, and at once charged the Emporia Bank and credited themselves with the amount, and on the same day by letter informed the Emporia Bank that this had been done; and by letter they also notified Donnell, Lawson & Co., to credit the account of the Emporia Bank with the sum named. The Emporia Bank also gave the Mastin Bank credit for the amount. These facts were held to constitute an agreement estopping the one bank from saying the deposit had not been transferred to the amount of \$5000, and estopping the other bank to deny an extinguishment of the indebtedness. "Written out, the contract indicated by the bank entries and the correspondence is one of assignment of so much of the credit or funds then to its credit with Donnell, Lawson & Co., to the Emporia Bank, and a discharge of a debt due by it to that bank. The whole was completed the moment the letter of the Mastin Bank to the Emporia Bank was placed in the post office."

In *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83, 88, it was again held that while the mere delivery to a third person of a check or draft drawn by a creditor upon his debtor does not effect a legal transfer of the debt, yet an equitable assignment may be effected in this way should such be the intention.

The doctrine of these cases was approved in *First Nat. Bank v. Clark*, 134 N. Y. 368. In *Gardner v. National City Bank*, 39 Ohio St. 601, "the controversy was between assignees in insolvency and the owners and payees of a check or draft made by the insolvents. The assignees in insolvency were held to stand in the shoes of the insolvent debtors and to have only their rights in the premises, and it was adjudged that parol evidence that the draft was for the exact amount owing by the drawers, in connection with other facts appearing from the evidence, sufficiently established the intention to transfer the property in the fund and constituted an equitable

assignment thereof good as against the general creditors of the insolvent."

Reference may be made, also, to *Nesmith v. Drum*, 8 W. & S. 9; *First Nat. Bk. v. Gish*, 72 Pa. St. 13; *Jermyn v. Moffitt*, 75 Pa. St. 399; *Hemphill v. Yerkes*, 132 Pa. St. 545; *Taylor's Est.*, 154 Pa. St. 183; *Kingman v. Perkins*, 105 Mass. 111.

The cases which have been cited above are cases in jurisdictions where checks given in ordinary commercial transactions are held not to constitute equitable assignments. They show that even in those jurisdictions the question has been held to be one of intent. There are very strong intimations in English cases to similar effect, which are recited by Mr. Justice White, in his opinion in the *Keystone Bank* matter. Thus, speaking of a letter forwarded by the maker of a check, which letter it was contended created a charge in favor of the payee, Jessel, M. R., said: "You can have no charge in equity without an intent to charge."¹ So Vice Chancellor Bacon said, in respect to a bill of exchange for the exact amount of a deposit, that whether it should be regarded as an equitable assignment or not "must rest on evidence."² In *Citizen's Bank v. First Nat. Bank*, L. R. 6 H. L. 352, there was a similar dictum of strong character by Lord Chancellor Selborne. An effort was made in that case to establish a parol contract that certain bills of exchange should be paid out of a specific fund. The chancellor said, "Of course, if proved, it would have been a very clear case of contract for an equitable assignment."

All the decisions and *dicta* that have been narrated are but in strict accord with general equitable principles, relative to orders. If the check is intended by the parties to charge a particular fund, it is then an order rather than an ordinary check or draft, and as such the authorities in regard to orders are directly in point. *Simmons v. Cincinnati Sav'gs Soc'y*, 31 Ohio St. 457 (1877), should be mentioned as inconsistent with the decisions herein narrated. A depositor had \$300 in the bank, and undertook to give that amount by giving a check

¹ *Hopkinson v. Forster*, L. R. 19 Eq. 74.

² *Shand v. Du Boisson*, L. R. 18 Eq. 283.

for the sum. It was held that the gift remained incomplete until the check was either paid or accepted; and that in the absence of such payment or acceptance, the death of the drawer operated, as against the payee, as a revocation of the check. See to same effect, *Matter of Smith*, 30 Hun. (N. Y.) 632.

III. *Orders*. The rule was thus announced by Lord Cottenham: "In equity, an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund."¹ The rule thus stated is amply sustained by the authorities.

The leading case is *Row v. Dawson*, 1 Ves. Sr. 332, decided in 1749 by Lord Hardwicke. Tonson and Cowdery lent money to Gibson, who made a draft on Swinburn, the deputy of Horace Walpole, viz.: "Out of the money due to me from Horace Walpole out of the Exchequer, and what will be due at Michaelmas, pay to Tonson £400, and to Cowdery £200, value received." Gibson became bankrupt. The instrument recited was held to be an equitable assignment which would prevail against the assignees in bankruptcy. Lord Hardwicke said: "This demand, and the instrument under which the defendants claim, is not a bill of exchange, but a draft; not to pay generally, but out of his particular fund, which creates no personal demand: therefore not a draft on personal credit to go in the common course of negotiation, which is necessary to bills of exchange, by draft on the general credit of the person drawing, the drawee, and the indorser, without reference to any particular fund. . . . If this is not a bill of exchange, nor a proceeding on the personal credit of Swinburn or Gibson, it is a credit on this fund, and must amount to an assignment of so much of the debt; and though the law does not admit an assignment of a *chose in action*, this court

¹ This was in the well-known case of *Burns v. Carvalho*, 4 Myl. & Cr. 690 (1839).

Under 36 & 37 Vict., 1873, ch. 66, § 25 (6), such equitable assignments with express written notice to the debtor, etc., convey the legal title, subject to equities.

does; and any words will do, no particular words being necessary thereto."

Ex parte South, Matter of Row, 3 Swanst. Ch. 391, was decided by Lord Eldon, in 1818. There the order was given by a trader to a creditor, directed to the executor of the trader's debtor. The trader afterwards became bankrupt, before the order was paid. Lord Eldon held that the order was an equitable assignment, and undisturbed by the trader's bankruptcy.

In *Lett v. Morris*, 4 Sim. 607 (1831), a builder gave to the timber merchant who was to supply him with timber for the work an order upon the owners for whom the work was to be done, authorizing payment out of parts of various instalments named, the timber merchant's receipt to be a discharge. This was held to be an equitable assignment, by Shadwell, V. C.

In *Burn v. Carvalho*, 4 Myl. & Cr. 690 (1839), before Lord Cottenham, one Fortunato had in the first instance given bills of exchange on one Rego, in Bahia. Rego refused to accept the bills, which were dishonored. The payees wrote to Fortunato, expressing their surprise and concern, and requesting orders to Rego to deliver to them goods of value equivalent to the bills. Fortunato replied, promising to give the desired orders, and he wrote also to Rego directing the latter to deliver certain goods over to the payees. Before the delivery of the goods pursuant to this direction Fortunato failed. It was held that the letters to the payees and to Rego constituted an equitable assignment.

In *Diplock v. Hammond*, 2 Smale & Giff. 141 (1854), Hammond, a contractor, engaged in work upon a poor-house and being indebted to plaintiff, gave the plaintiff an order on the governors of the poor-house. This was held to be an equitable assignment, and not a mere order requiring a stamp under 55 Geo. III. c. 184.

Another prominent case in this connection is *Brix v. Banister*, 3 Q. B. D. 569, decided in 1878, by the Court of Appeal. There a ship-builder gave to his creditor, the plaintiff, an order on the defendant, for whom he was constructing a ship, for £100 out of moneys due or to become due. No-

moneys were then due except what had been paid, and the defendant refused to be bound by the order, and afterwards paid all the balance due to the ship-builder. It was held that the order was an assignment of all moneys due or to become due, to the extent of £100.¹

What is known as the rule in *Dearle v. Hall*, 3 Russ. 1 (1823), is that "notice is necessary to perfect the title, to give a complete right *in rem*, and not merely a right as against him who conveys the interest."²

This notice is not essential, however, except to priority.³ And even as to that it was held not essential, where it was impracticable to give it, in the case of an order affecting a ship at sea.⁴ The assent of the depository or debtor is not necessary to the equitable assignment.⁵

In 1873, in *Ex parte Shellard*,⁶ it was held that an order was not an equitable assignment where not accepted and where for but part of the fund. This case is contrary to *Brice v. Bannister*,⁷ and has been otherwise disapproved.⁸

A mere note to a debtor, asking the latter to pay an amount named to a person mentioned, and not engaging with respect to a particular fund, is not an equitable assignment.⁹ A letter

¹ Brett, J., dissented. The case of *Ex parte Shellard*, L. R. 17 Eq. 109, decided in 1873, by Sir Jas. Bacon, C. J., was disapproved.

² Snell's Eq. (9th Ed.) 96; Johnson v. Cox, 16 Ch. D. 571.

³ Farquhar v. Toronto, 12 Gr. (Upper Canada), 189; *In re Pole's Trusts*, 2 Jur. N. S. 685; *Re Way's Trusts*, 5 New Rep. 67. And see Walker v. Bradford Old Bank, 12 Q. B. D. 511; Rodick v. Gandell, 1 De G. M. & G. 780; Johnstone v. Cox, 16 Ch. D. 571; Freshfield's Trust, 11 Ch. D. 198; Newman v. Newman, 28 Ch. D. 674; Buller v. Plunkett, 1 J. & H. 441.

⁴ Feltham v. Clark, 1 D. G. & Sm. 307 (1847).

⁵ Farquhar v. Toronto, 12 Grant, 189; Yeates v. Groulx, 1 Vea. Jr. 285; Harding v. Harding, 17 Q. B. D. 446; Brice v. Bannister, 3 Q. B. D. 569. And see Greenway v. Atkinson, 29 W. R. 560; *Ex parte South*, 3 Swan. 391; Lett v. Morris, 4 Sim. 607; Percival v. Dunn, 29 Ch. D. 128.

⁶ L. R. 17 Eq. 109. ⁷ Ante.

⁸ Back v. Robson, 3 Q. B. D. 686 (1878).

⁹ Percival v. Dunn, 29 Ch. D. 128 (1885); Watson v. Duke of Wellington, 1 Russ. & Myl. 602 (1830); *Ex parte Hall*, 10 Ch. D. 615 (1878).

A mere letter to a depository, not communicated to the person intended to receive the money, is not an assignment: Morrell v. Wootten, 16 Nev. 107.

to a tenant to pay a sum named to a third person is not enough; and as rent is an interest in land under the English Statute of Frauds, the court there will not receive parol evidence to connect such a letter with the fund or amount due by the tenant.

Nor is a direction to the writer's agent to receive money due by a debtor and to pay it over to a creditor an equitable assignment, although said agent promises the said creditor to carry out the instruction. An order on a debtor, and an authority to some one else, are essentially different things.¹

The foregoing order cases are English; but this is merely because it happened to be more convenient at the time to get them, and not because American cases are not to the same effect and equally accessible.²

IV. *Gifts of Donor's own Check.* All the foregoing long discussion is very pertinent to the question propounded at the outset, namely, whether a delivery of donor's own check may constitute a valid *donatio mortis causa*. On principle, it seems clear that such a gift is valid. A *donatio mortis causa*, to be valid at all, must be made under circumstances which relieve the court from doubt whether such a gift was intended and actually took place. This necessity of clear proof exists where the gift is of keys, bonds, mortgages, notes of third persons, or of whatsoever it may be. Where there is the likelihood of fraud, no donation *mortis causa* is allowed. The proof, must be clear and satisfactory. The gift must be made under circumstances which create in the donor the apprehension of an impending death. Some exceptional cases might exist where a merchant might be carrying on his business while in constant peril; but the ordinary gift *mortis causa* is by a man confined to his bed by severe illness, at a time when it would be folly to term his bank account a "current" account, to quote the term used by an English judge. Such a donor regards his account as fixed, and his check as drawn on a particular fund and not on

¹ *Rodich v. Gandell*, 1 De G. M. & G. 763 (1851).

² There is an excellent review of the American cases in *Pomeroy's Eq. Jur.* § 1280, *et seq.*

his general credit. It is impossible for us to assume that he meant the check as addressed on his general credit, for then it would be in the nature of a promise. A promise cannot be understood. If the check on the bank is not good, the donor certainly does not mean that his general estate shall compensate for it. On the contrary, he thinks he is making a present, cash gift. He knows that his bank account has ceased to be an active one, and regards the check as transferring so much of it as the check calls for.

We must then hold that it is the intent of the donor that his check shall work an immediate assignment by way of *donatio mortis causa*. This was the opinion of Ruggles, J., in the very notable case of *Harris v. Clark*, 3 Com. (N. Y.) 93 (1849).

He expressly distinguished a check from a draft in a question of gift *mortis causa*, and intimated that a different decision might be made concerning gifts *mortis causa* of donor's check from what the court then made in respect to a gift of a bill of exchange.

The question does not seem to have arisen in the American Supreme Courts. There are a few *dicta* favorable to the upholding of such a gift *mortis causa*. Besides *Harris v. Clark*, just mentioned, see *Gowley v. Luisenbigler*, 51 Pa. St. 345; *Rhodes v. Childs*, 64 Pa. St. 18. *Simmons v. Cincinnati Sav'gs Soc'y*, 31 Ohio St. 457, stated *supra*, is somewhat obscure, in this connection. If pertinent here, it is adverse to the theory of an assignment. In *Matter of Smither*, 30 Hun. (N. Y.) 632, the gift *mortis causa* by donor's check was held invalid, in one of the departmental courts.

In England, the question has been before the courts a number of times. At first, it was held that such a donation *mortis causa* is valid. Afterwards, one or two judges in courts of the first instance have held that there is no validity either at law or in equity in such a gift. Lately, Lord Lindley intimates that he is dissatisfied with the rulings in the cases denying that such gifts can be made; and the principles established or rather confirmed in the case before him are strongly in favor of the gifts: *Re Dillon*, *Duffin v. Duffin*, 44 Ch. D. 76 (1890).

Lawson v. Lawson, 1 P. Wms. 439, 1718, was decided by the Master of the Rolls, in 1718. The reporter thus states the facts: "The testator being languishing upon his death-bed, drew a bill upon a goldsmith to pay £100 to his wife, to buy her mourning and to maintain her until her life-rent (meaning her jointure) should become due, and soon afterwards, (viz., about seventeen days after the drawing of the bill) the testator died." The court at first held that the testator's ordering the goldsmith to pay £100 to his wife was but an authority, and determined by the testator's death. Afterwards, the Master of the Rolls delivered his opinion solemnly, and held the bill good, and to operate as an appointment, although, if the wife had received it during the husband's lifetime, it would have been liable to some dispute; even then, he inclined to think that she should have kept it; that being for mourning, it might operate like a direction given by the testator touching his funeral, which ought to be observed, though not in the will. An extravagant gift, the chancellor ought not to make good, but the gifts here were but £200 whereas the personal estate amounted to £8000.

This case of *Lawson v. Lawson*, is one which has been hemmed over and looked askant at. Just why, it is hard to say, unless we dare to assume that it has not really been read and considered, which of course we cannot do; but such has been its reception of late. It is for us to jog along, nevertheless, seeking to keep the path we believe it unerringly points out.

Tate v. Hilbert, 2 Ves. Jr. 111, 1793. Here Lord Chancellor Loughborough had before him the case of a common check on a banker, intended to effect a gift *inter vivos*. He held that such a gift could not be regarded as an "appointment." He referred to *Lawson v. Lawson*, *supra*, and lamented the inaccuracy of the report in Peere Williams; which in one part attributes as the ground of decision the assumption that the bill there was an appointment; and which again lays stress on its being for mourning. He goes on to say, speaking first of *Lawson v. Lawson*: "Taking the whole bill together, it is an appointment of the money in the banker's hands to the

extent of £100 for the particular purpose expressed in a written appointment; which is a purpose, that necessarily supposes his death. Therefore that case is perfectly well decided. But upon that decision I cannot say, that in all events drawing a cash note upon a banker is an appointment of the money in his hands. Suppose I was to apply that idea of an appointment, this is to take effect presently, and has no relation to his death. The plaintiff might have received it immediately. There is no reference at all to the case of her surviving him. It was not appointed under such circumstances, that it could not take effect but in case of his death; but it is stronger in this particular case, as by the evidence it was given, and fairly given" The transaction before him being one *inter vivos*, could not be interpreted as meaning to effectuate an assignment as against his executor, and could only be considered in the light of a promise; for certainly he did not mean by giving the check to make an assignment good against himself. Lord Loughborough decided, therefore, that the check in the case before him was rendered void by the intended donor's death. The reasoning of Lord Loughborough has been received with the same suspicion which some would cast upon *Lawson v. Lawson*. Yet it is very clear that he was making a distinction between gifts *mortis causa* and gifts *inter vivos*, and would infer an intent to make an assignment in the first class of gifts where he would refuse to impute such an intent to a transaction *inter vivos*. We can certainly approve of the distinction he makes even though we may not care to adopt his reasoning in its entirety. An intent to make assignment of a closed account or of a part of it is more easily inferred than is an intent to assign part of a "current" or active account.

Easton v. Pratchett, 1 Cr. M. & R. 798, at 808 (1835). This was a case where plaintiff endeavored to hold defendant to an endorsement of a bill of exchange. Lord Abinger said: "If a man give money as a gratuity, it cannot be recovered back, because the act is complete; yet a man who promises to give money cannot be sued on such promise; and if so, I do not see how a promise in writing not under seal can have any binding effect. The law makes no difference between

such a promise and a verbal one. There is the same distinction as to a bill of exchange. If a party gives to another a negotiable instrument, on which other parties are liable, the man who makes the gift cannot recover the bill back, and the man to whom the bill is given may recover against the other parties on the bill; but it is a very different question, whether the giver binds himself by the indorsement, so as to make himself liable thereupon to the person to whom he gives it."

Bonts v. Ellis, 17 Beav. 121 (1853). Affirmed on appeal, 4 De G. M. & G. 249 (1853). This was a case of *donatio mortis causa*. The decedent gave his wife a check for £1000. Afterwards, because the check was crossed and it was feared that the bank might not pay it over the counter, the check was exchanged for a friend's check, which was likewise crossed and which was post-dated. The donor's check so given to the friend was cashed; but the crossing and post-dating of the friend's check prevented its being paid. The donor died, and subsequently the friend gave the donee another check, which was paid. It was held that there had been a valid gift *mortis causa*; that the friend received the donor's check as agent for the donee, and that when it was cashed the money was actually received on behalf of the donee and before the donor's death.

Hewitt v. Kaye, L. R. 6 Eq. 198 (1868). This case was decided by Lord Romilly, Master of the Rolls. It was a contest between two charities, and was not carried up. Which-ever might be the decision, the money was bound to go to charity, and we may not suppose that vigor of argument and attention which ordinary contests excite. Lord Romilly held that a donor's own check could not be the subject of a gift *mortis causa* if not paid or presented before donor's death.

Bromley v. Brunton, L. R. 6 Eq. 275 (1868). This was a case of gift *inter vivos*. A check for £200 was given by A. to B. It was presented without delay. The bankers had sufficient assets of A., but refused payment because they doubted the signature. The next day A. died, the check not having been paid. Sir John Stuart, Vice Chancellor, held that there had been a complete gift, *inter vivos*, of the amount of

the check. The contest was between the donee and the administrator.

Hawkins v. Allen, L. R. 10 Eq. 246 (1870). The check here would have been sufficient, for it was cashed, and the money invested, before donor's death; but the gift was void under the mortmain law.

Beak v. Beak, L. R. 13 Eq. 489 (1872). This case was decided by Bacon, Vice Chancellor. He held that the donor's estate could not be bound by donor's delivery of check and pass-book, the check not being paid or presented before the donor's death. There is no discussion of principles; and the case is merely rested on *Hewitt v. Kaye*, *supra*, and on *Ames v. Wile*, the latter having respect to pass-books.

Rolls v. Pearce, 5 Ch. D. 730 (1877). In this case, donor and donee were English people resident in San Remo, in Italy, where they had gone for the benefit of the donor's health.

The donor, seeing that he was not going to recover from his illness, gave two checks to his wife, payable to her order, for £350 altogether, and drawn on his bank in England. The checks were deposited to the wife's account, in an Italian bank. She drew upon them, and paid debts of her husband out of the money. One of the checks was long in coming to England—some two months, and a few days before either one reached the donor's bank the donor died.

Malins, Vice Chancellor, held that the checks constituted good donations *mortis causa*, and for two reasons. First, "these checks are payable to order; and it is clear that the testator knew that they could not be presented for payment either on the day they were drawn or on the subsequent day. I must attribute to him the knowledge that the check would not be paid for some time, and on that ground I come to the conclusion that this case differs from the other cases of checks." The second reason was that the checks had been actually dealt with for value. The Vice Chancellor continued: "But I have also the decision of Lord Loughborough in *Tate v. Hilbert*, 2 Ves. 111. He there says: 'If she has paid this away either for valuable consideration or in discharging a debt of her own, it would have been good.'"

Austin v. Mead, 15 Ch. D. 651 (1880). In this case the donor held a deposit note for £2700, and gave a seven days' notice to the bank that he wished to withdraw the deposit. Afterwards the donor signed a form of check which was on the back of the deposit note: "Pay self or bearer £500." He then handed the note to the donee, and before the seven days' notice had expired, he died. Fry, J., held that the check was not payable until after the date when the intended donor died.

Clement v. Cheesman, 27 Ch. D. 631 (1884). In this case there is a *dictum* by Chitty, J., that donor's own check cannot form the subject of a *donatio mortis causa*.

Duffin v. Duffin, 44 Ch. D. 76 (1890). This is the first-mention we find of the question in an appellate court. All the check cases mentioned above were before courts of first instance. In *Duffin v. Duffin* there are but *dicta* merely. Cotton, L. J., seemed to think that donor's check could not be the subject of gift *mortis causa*; whereas Lindley, L. J., said: "It is said that there was no good *donatio mortis causa*, because a man cannot make such a gift of his own check. I will assume that to be correct, though I think it may some day require consideration." The opinions in this case are well considered, and sustain and enforce the doctrine of Lords Hardwicke and Eldon that if donor gives up the means of getting at possession, such delivery supports the gift. The court held that a deposit note, although not representing the debt, could form the subject of a gift *mortis causa*.

This is really a strong case in favor of the contention that donor's check can effect a gift *mortis causa*.

Porter v. Walsh, Irish Rep., Ch. D. 1895, vol. 1, 284 (1894). In this case there is a bare mention of the question.

The foregoing review of the authorities shows that both in this country and in England the authorities are not harmonious. It may be urged that the reasoning in the carefully considered case of *Duffin v. Duffin*, *In re Dillon*, 44 Ch. D. 76 (1890), is strongly in line with *Lawson v. Lawson*, where such a gift was upheld by Lord Loughborough.

Snelgrove v. Bailey, 3 Atk. 214, and the great case of

Duffield v. Elwors, 1 Bli. N. S. 497, established the principle that when the gift was one *mortis causa*, if the donor delivered the means of getting at the possession, the gift would stand. A check so intended by the parties is certainly as much a means of getting at possession as is a tally stick, an unsigned (at law) bond or mortgage, unendorsed note, or key to a safe deposit vault, especially when the donor has two such keys and delivers one. In *Thomas's Admr's v. Lee*, 89 Va. 1 (1892), a delivery of one of two keys to a safe deposit vault, the other having been placed at a prior date with a friend as a precaution, was held to carry a gift *mortis causa* the contents of the box in the bank.

It has been argued against the validity of the donor's check, here he dies before it is paid or presented, that it is revocable and he may recall it or that other holders of checks may draw out the whole fund. If the donor's mind is unstable and not under his control, no gift, whether by check or howsoever, is good. Moreover, revocability attaches to all gifts *mortis causa*. Without that attribute no transaction can be a *donatio mortis causa*. As to the argument that other checks may withdraw the fund, it is submitted that this argument contemplates a state of facts contrary to conditions surrounding almost all donations *mortis causa*, which are usually by persons of exhausted vitality whose bank accounts have ceased to be "current." We ought certainly to say, therefore, that a check so given is upon a designated fund.

Before closing, it is well to recall here the observation of Lord Loughborough in *Tate v. Hilbert*, 2 Ves. 111. He said that if the donor's promissory note had been paid away for valuable consideration or in discharging a debt of the donee, even a gift of the donor's own note would be good because consummated in that way; the idea evidently being that third persons' rights intervening could not be disturbed; and the gift obtaining on their account a completion, the completion enured even to donee's benefit; because the gift could not be said to be both executed and not executed. If then the donee

of the check should deposit it, or should pay it away for value, the gift would seem to be good, irrespective of the argument heretofore advanced.¹

Luther E. Hewitt.

April 15, 1897.

¹ In the former part of this article, it was said that while a savings-bank book did not represent the debt in a legal sense, it formed a valuable means of "getting at the possession" of the deposit. In this connection, see *Farmers & Mech. Bank v. Borae*, 1 Rawle (Pa.), 152, decided in 1829. In that case, a plaintiff suing a bank for the amount of a deposit was allowed to give in evidence his bank-book showing the deposit, as an admission by the bank that it had received the amount of the entry.

Reference may be made also to *Hollenstein v. Kohler*, 37 Leg. Int. (Pa.) 333, and to *Haley v. Caldwell*, 2 Miles, (Phila. District Court), 334. In these cases, it was held that bank-books are instruments of writing for the payment of money, within the terms of the Pennsylvania Statute, providing for judgment for want of an affidavit of defence. Over against these stands *Walsh's Appeal*, 122 Pa. 177, which, after all, we cannot be sure was meant to affect savings-banks books in general. See *Hemphill's Estate*, 180 Pa. 87, 92.

THE CASE OF THE TRANS-MISSOURI FREIGHT ASSOCIATION.

The importance of the decision of a court of justice may depend either upon the principle involved in the decision, or upon the practical effect of the decision as affecting human life, liberty or property interests. The recent decision of the Supreme Court of the United States is of wide spread importance, not only by reason of the principle of law involved by the court, but because the enunciation thereof may seriously affect the value of securities of railways in the United States. This decision was rendered in the case of the Trans-Missouri Freight Association, decided on March 22, 1897. In view of its importance, and of the general apprehension that it has caused, it may be of some value to consider carefully the decision, not only as to that which was actually decided with reference to the facts of the particular case, but also as to the principle of law, which will determine similar cases as they may arise in the future. If the principle itself be of importance, a *fortiori*, is it so when declared by a court, the breadth of whose jurisdiction and whose personnel entitle any decision thereof to the utmost respect.

The facts in the case are as follows: By articles of agreement, dated March 15, 1889, fifteen railroad companies, competitors for the freight traffic in that part of the United States between the Mississippi and Missouri Rivers and the Pacific Ocean, formed an association called the Trans-Missouri Freight Association. The articles of agreement provided, *inter alia*, that the parties thereto would establish and maintain such rates, rules, and regulations on freight traffic between competitive points as a committee of their choosing should recommend as reasonable; that these rates, rules, and regulations should be public; that there should be monthly meetings of the association composed of one representative from each railroad company; that each company should give five days' notice before each monthly meeting of every reduction of rates or deviation from the rules it should propose to make; that it

would advise with the representatives of the other members at the meeting relative to the proposed modification; that it would submit the question of its proposed action to a vote at that meeting, and if the proposition should be voted down, that it would then give ten days' notice that it would make the modification, notwithstanding the vote, before it should put the proposed change in effect, and that no member would falsely bill any freight, or bill any freight at a wrong classification; and that any member could withdraw from the association on a notice of thirty days. The articles further provided that in case any of the managers of the lines, parties to the agreement, should fail to agree upon any question arising thereunder, that then the question should be referred to an arbitration board, which should consist of three members of the executive board of the Inter-State Commerce Railway Association, provided, however, that in case of arbitration in which the members of the association only were interested, that they might by unanimous vote substitute a special board. In other words, it was in substance, "an agreement between the corporations by which a uniform classification of freight is obtained, by which the secret undercutting of rates is sought to be avoided, and the rates as stated in the published rate sheets, and which, as a general rule, are required by law to be filed with the Inter-State Commerce Commission or secured against arbitrary and sudden changes."¹

On January 6, 1892, the United States Attorney for the District of Kansas, under the direction of the Attorney-General, filed a bill in equity in the Circuit Court of the United States of the District of Kansas on behalf of the United States against this Association, and the railway companies which constituted the same. The bill, after reciting the articles of agreement in question, alleged, *inter alia*, that the defendant railroad companies were common carriers, and owning independent and competitive lines of railroads in that part of the United States west of the Mississippi and Missouri Rivers; that they were engaged in transporting freight among the states and to and from foreign nations; that the defendants

¹ Per White, J., in his dissenting opinion.

not being content with the rates of freight that they were receiving, intending oppressively to augment these rates so as to counteract the effect of free competition upon them, and establish and maintain arbitrary rates, thus procuring large sums of money from the people engaged in inter-state commerce in the aforesaid territory; that under the agreement rules, regulations, and rates for carrying freight over the railroads of the defendant companies were fixed by the association, and have since been maintained by them; that since that date these railroad companies have declined and refused at all times to fix or give rates for the carriage of freight based upon the cost of constructing and maintaining their several lines of railroads and the cost of carrying freight over the same, and such other elements as should be considered in establishing tariff rates on each particular road; and that the people engaged in inter-state commerce have been compelled to pay the arbitrary rates of freight and submit to the arbitrary rules and regulations established and maintained by the association under the agreement, and have been and are deprived of the benefit that might be expected to flow from free competition between the several lines of railroads of the defendant companies, and that in this way the defendant companies have continued, in restraint of trade and commerce, among the states, and have attempted to monopolize and have monopolized a part of this commerce, in violation of the provisions of the Act of Congress, July 2, 1890.¹ The bill further prayed a decree dissolving the association, and asked for an injunction restraining the several defendants from carrying out the terms of the said agreement, or from agreeing to prevent each and any of them from carrying freight at such rates as shall be voluntarily fixed by the officers and agents of each of said roads, acting independently in its own behalf.²

¹ 26 Stat. at Large, 209, Ch. 647.

² The title and sections of that act material to this question are as follows:

AN ACT to protect trade and commerce against unlawful restraints and monopolies.

Sec. 1. Every contract, combination in the form of trust or otherwise,

The answer of the defendants admitted that they were common carriers, that they owned independent and competing lines of railroads, but denied that they owned the only through lines of railroads in the aforesaid territory; it also admitted that they had entered into the agreement in question, that rules, regulations and rates of freight have been fixed and changed by the association formed, which rates have been complied with and maintained. They denied that they intended, in connection with the formation of the association or otherwise, to unjustly or oppressively augment such rates, or to counteract the effect of free competition on prices, or facilities of transportation; they deny that they had any intention by the formation of the association to monopolize or attempt to monopolize the freight traffic affected by it, and deny that the agreement has had such effect. Pending the decision thereof, the association was voluntarily dissolved. The cause having been heard on bill and answer on November 28, 1892. Judge Riner, the District Judge,¹ dismissed the bill for two reasons, (1) that the agreement in question was not a contract in restraint of trade within the meaning of that phrase as used in the Act of July 2, 1890, as the restraint provided for in the agreement was a reasonable one, in that it was necessary to the protection to the parties to this agreement and was not prejudicial to the public interests, and neither was it a monopoly nor an attempt at one; and (2) that common carriers were not within the provisions of the Act of July 2, 1890. Their

or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

¹ 53 Fed. Rep. 440.

duties and liabilities being solely governed by the provisions of the "Inter-State Commerce Act."¹ Upon an appeal to the Circuit Court of Appeals of the Eighth Circuit, that court of two to one, on October 2, 1893,² by a vote affirmed the decision of the District Judge, for the first reason as given by him and declining to decide whether common carriers were subject to the Act of July 2, 1890. An appeal was then taken to the Supreme Court of the United States, who, by a vote of five to four, reversed the decisions of the Circuit Court of Appeals and of the District Court. Mr. Justice Peckham delivering the opinion of the court on behalf of himself, and Justices, Brewer, Brown, Fuller, and Harlan, while Mr. Justice White delivered a dissenting opinion in which Justices Field, Gray, and Shiras concurred.

The importance of the decision would seem to justify the detail in which the facts have been stated. Two substantial questions were presented to the court, both of which must be and were answered in the affirmative in order to maintain the bill :

(1) Does the Act of July 2, 1890, embrace within its provisions common carriers by railroads, and if so (2), does the agreement set forth in the bill violate any provisions of that Act? In this article it is proposed to only consider briefly the facts in the case and the opinion of the court in answering the second question in the affirmative. An examination of the Act of July 2, 1890, will show that it is aimed at two evils, (a) contracts in restraint of trade, and (b) monopolies. Mr. Justice Peckham, in his opinion, does not pretend that the agreement in question constituted a monopoly or an attempt at one, but bases the decision of the court solely upon the ground that the articles of agreement which gave birth to the Trans-Missouri Freight Association constituted a contract in restraint of trade, as that phrase is used in the Act of July 2, 1890, and that, therefore, the execution thereof was in violation of the terms of that act.

Under this view of the statute it is of importance to deter-

¹ Act of Congress, Feb. 4, 1887.

² 58 Fed. Rep. 52.

mine what is a "contract in restraint of trade" as shown by the historical development of this branch of the law.

It is submitted that the history of its development is the history of a judicial declaration of public policy, undoubtedly sound at the time it was made, of its continued declaration by the courts, together with a grudging recognition that the severity of the common law rule should be changed to meet the changes in industrial conditions, and that as the reason for the rule became limited in its application so correspondingly should the prohibited class be narrowed. At the time when this doctrine was first enunciated by the courts (1415), combinations of capital such as exist to day were of course unknown. The protection of the individual was the *ratio decidendi*, indirectly of course, the interests of the public were considered for "especially in young men, who ought in their youth (which is the seed time) to have lawful sciences and trades which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age, and therefore the common law abhors all monopolies which prohibit any from working in any lawful trade."¹

The commercial activity of England: the fact that no longer could a man only lawfully exercise a trade to which he had been duly apprenticed and admitted, soon demonstrated to the English courts that such, a *priori*, declarations of public policy as given above were not, *ipso facto*, sound and that a practical enforcement thereof would foster the very evil that the doctrine was meant to prevent, and so the courts said, "if the restraint be partial with respect to space, and reasonable; we will enforce it,"² and we will consider it reasonable if two elements be present, first, necessity of such protection to the promisee, and second, that such protection shall not be so large as to interfere with the interests of the public³ and finally the courts declared that the fact that the restraint was partial as to space was no longer a pre-requisite to its validity.⁴

¹Ipswich Taylor's Case, 11 Cooke, 540.

²Mitchell v. Reynolds, 1 P. Wms. 181.

³Homer v. Graves, 7 Bing. 735.

⁴Jones v. Lees, 1 Man. & Gr. 195; Ronsillon v. Ronsillon, L. R. 14 Ch. D. 351; Mills v. Dunham, 1 Ch. 576; Nordenfellt v. Nordenfellt Guns and Ammunition Co., 94 App. C. 535.

The development, in the United States, of this branch of the law can hardly be said to have kept pace with the industrial development of the country. Our courts have forgotten that "Public policy is an unruly horse, and once you get astride of him you never know where he will carry you," (per Mr. Justice Burrough in *Richardson v. Mellish*, 2 Bing. 229) and have ridden that horse at every opportunity. At one time it was thought that "with regard to domestic interests each state is a separate community, and it is by no means the same thing to the people of a state whether an individual carries on its trade within or without its borders," and that therefore a restriction co-extensive in point of space with the boundaries of a state was contrary to the public policy of that state, even though the individual so restrained could exercise his trade anywhere else, and this extremely liberal view prevails to-day in Michigan.¹ Fortunately, however, as it came to be understood that the states were not separate communities with respect to their business interests, a broader view prevailed, and even though a restraint be co-extensive with the state, yet if it be reasonable the court will enforce it. If, however, the restraint be co-extensive with the United States, the current of authority would seem to hold it invalid, irrespective of the question of reasonableness, though the courts of New York, Missouri, and Minnesota, follow the modern English rule.²

From this cursory sketch of the development of the law, it can be seen that the law as to contracts of this character is founded solely upon public policy, and as public policy changes, so must the law change, and that therefore the question as to whether or not a given contract is in restraint of trade is a question which depends upon what constitutes public policy "at the time of the contract's enforcement."

But, as is stated by Mr. Justice Peckham in his opinion, the plain words of the Act of 1890 are, "Every contract . . . in restraint of trade . . . is hereby declared to be illegal," and the term includes all kinds of those contracts which in fact restrain, or may restrain, trade.

¹ *Western Wooden Ware Association v. Starkey*, 84 Mich. 76.

² See AM. LAW REGISTER AND REVIEW, January, 1893. p. 50.

What, then, is the technical meaning of the phrase, "contracts in restraint of trade." Does it include all contracts, though they, in some measure, legally restrain trade, or is its meaning restricted to contracts whose restraint is unreasonable, and therefore invalid?

It must be admitted that in the cases there can be found *dicta* from numerous Judges who use the phrase, "contracts in restraint of trade," as having a generic meaning, irrespective of the question as to the validity of the restraint.

But, on the other hand, what is the historical origin of the rule? How was it that contracts of this character fell under the ban of the common law? *It was not because they restrained trade in any way at all, but because they restrained it in such a manner as to be contrary to public policy.*

It may be perfectly true that *Dyer's Case*,¹ and *Colgate v. Batchelor*,² decided that any restraint was invalid, but that was because in those cases the courts declared that at that time any restraint on trade was contrary to public policy.

As then public policy is the determining factor if the restraint of the contract is not contrary to public policy, then it is not invalid, and is not a "contract in restraint of trade." That this definition is sound can be seen from an examination of some of the recent decisions on this subject. In *Brewing Association v. Houck*,³ a brewing association had entered into a contract with certain persons to furnish beer to them and not to any other person in a given city for the period of one year. In delivering the opinion of the court, James, C. J., said (page 696): "We think that the contract entered into by the defendants and their associates was not objectionable as being in restraint of trade at common law."

In *Davis v. Brown*,⁴ Guffy, J., said: "A contract on the part of appellant to not engage in the buggy business in 'O' county was not void as being in restraint of trade."

In *B. E. V. R. R. Co. v. N. V. R. R. Co.*,⁵ Dean, J., in de-

¹ 1415, Y. B. 2 H. 5, pl. 22.

² Cro. Eliz. 872.

³ 1894, 27 S. W. 692, 88 Tex. 184.

⁴ 1895, 32 S. W. 614.

⁵ 1895, 171 Pa. St. 284-299.

livering the opinion of the court, sustaining an agreement by which a railroad company contributed money for the development of ore land, the owner thereof agreeing to give to the railroad company all traffic to and from the land and the furnace thereon, said: "It is not in restraint of trade, for the express purpose and necessary effect are to increase both trade and population."

In *Matthew v. Associated Press of New York*,¹ the question before the court was as to the validity of a by-law of a new association, which in terms prohibited the members from receiving or furnishing "the regular news dispatches of any other news association covering a like territory and organized for a like purpose. Mr. Justice Peckham (then a judge of the Court of Appeals of New York), for the court, said (p. 340): "The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. The courts do not go to the length of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts, and to be enforced; they do, however, now hold many contracts not open to the objection that they are in restraint of trade, which a few years back would have been avoided on that sole ground, both here and in England So that, when we agree that a by-law which is in restraint of trade is void, we are still brought back to the question, What is a restraint of trade in the modern definition of that term?"

The authority to make by-laws must also be limited by the scope and purpose of the association. I think this by-law is thus limited, and that is not in restraint of trade, as the courts now interpret that phrase."

So, also, the House of Lords, in *Nordenfelt v. Nordenfelt Guns and Ammunition Company*,² held valid an agreement under which a patentee and manufacturer of guns and ammunition for purposes of war, covenanted with a company to which his patents and business had been transferred, that he

¹ 136 N. Y. 333.

² 12 App. Cas. 226.

would not for twenty-five years' engage, either directly or indirectly, in the business of a manufacturer of guns and amunition, not because the agreement in question was in reasonable restraint of trade, and therefore valid, but because its reasonableness prevented it from being in restraint of trade.

No one can doubt that the agreement in every one of these cases in some measure restrained trade; but as the opinions quoted show that they were not technical contracts in restraint of trade, they could only become so when their restraint was unreasonable.

Is not also the title of the act in harmony with this view? It reads: "An act to protect trade and commerce against unlawful restraints and monopolies;" not an act to protect trade against any restraint whatsoever, but an act to protect trade against unlawful restraints—that is, unreasonable ones—and it is submitted that the title of the act can be used as an aid to the construction of the body of the statute, not to contradict its plain terms, but as a help to determine the doubtful ones.¹

Indeed, Mr. Justice Peckham admits (page 22⁹) that "A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question." Why should a contract which is collateral to a sale be exempted from the operation of the statute while a contract not collateral to a sale be subject thereto?

There is nothing in the statute expressly or implicitly which would support such a construction. It would seem as if the learned judge was constructing a means by which the court might in future escape from the consequences of a strict adherence to his views.

¹ U. S. v. Palmer, 3 Wheat. 610, 631; Coosaw Mining Co. v. S. C., 144 U. S. 550, 563.

⁹ The paging refers to Senate Document No. 12, Fifty-fifth Congress, first session, which contains the opinions filed in the case.

But, objects Mr. Justice Peckham, in view of the difficulty of determining what is reasonable, to say that the reasonableness of such an agreement as this is the test of its validity "is substantially to leave the question of reasonableness to the companies themselves."¹ This is a difficulty which the courts have always been able to overcome in the four hundred years in which such questions have come before them. They have always solved the problem whether it was before them as an individual restraint or in the form of a combination of capital to control the production or sale of a particular article. Indeed, that very court, of which Mr. Justice Peckham is an honored member, has decided that the question as to the reasonableness of railway rates is a judicial and not a legislative one.² Even if the rules were likewise this association did not or could not fix a particular rate and compel its members to abide thereby.

Assuming, then, that the invalidity of the agreement depends upon its unreasonableness, are the provisions of the agreement in question unreasonable; that is, are they contrary to the interests of the public, and in deciding this question, the burden of proof is upon the one who asserts its invalidity.³

But, says Mr. Justice Peckham, the business which the railroads do, is "of such a public nature that it may well be doubted, to say the least, whether any contract which imposes any restraint upon its business would not be prejudicial to the public interest."⁴ Quoting in support thereof Fuller, C. J., in *Gibbs v. Baltimore Gas Company*, 130 U. S. 596, as to the distinction between the rules governing business of a public and private nature. Now it is perfectly true that public policy varies in this respect, but it is submitted that it is a difference which is not *ipso facto* determined by the character of the business. Another element must be considered, viz: the transaction itself, which is said to be in contravention of public policy.

It is believed that there is no authority other than loose

¹ Page 24.

² 1890, *C. M. & St. P. Ry. Co. v. Minnesota*, 134 U. S.; 1894, *Resgan v. The Farmers' Loan & Trust Company*, 154 U. S. 362.

³ Mr. Justice Chitty in *Mills v. Dunham*, 91, Ch. C. A. 576.

⁴ Page 24.

dicta, for the proposition that business of a public nature may be of such a character that any restraint whatsoever is incompatible with the interests of the public, irrespective of the nature thereof.

Examine the cases cited by Chief Justice Fuller. In *Transportation Company v. Pipe Line Company*, 22 West Va. 600, a grant of an exclusive right-of-way over a tract of land for an oil-pipe line was held void. Now a careful perusal of the opinion of the court (especially page 625) will show that the basis of the decision of the court was that the people of West Virginia had, by various statutes, emphatically declared that it was the public policy of that State that the business of railroading, telegraphing, and transportation of oil by pipes, should be carried on at any place that a corporation chartered for that purpose might choose.

In other words, the agreement in question was illegal, because contrary to public policy, and it was contrary to public policy, because the effect thereof which was to prevent corporations chartered for a public purpose, and a purpose in the performance of which the public had a peculiar interest, from the performance of their corporate duties.

In *The Western Union Telegraph Company v. The American Union Telegraph Company*,¹ the court held that: An agreement by a railroad company granting to a telegraph company the exclusive use and occupation of its right-of-way, was void because the means of inter-communication should not be monopolized, thus crippling competitors, and enabling one company to fix its tariff of rates at a maximum, governed alone by the necessities of its patrons.

So, in the *Chicago Gas Light and Coke Company v. The Peoples' Company*, 121 Ill. 530, where two Gas Companies had divided the City of Chicago, and agreed not to compete within each other's territory, the agreement was held bad, as tending to create a monopoly, and as an agreement not to perform the public duties for which the companies were chartered.

Again, where two railroads enter into an agreement not to

¹ 65 Ga. 160.

extend their roads, the agreement is void as a renunciation of their corporate duties;¹ but on the other hand traffic arrangements for through transportation, *i. e.*, arrangements for through tickets over connecting routes, are perfectly valid, and they may also provide for the division of fares based upon mileage.²

Also a railroad company may legally give another transportation company a monopoly of the handling of the business of the railroad.³

As briefly summing up the principle of these cases, it may be said that there is no business, whatever be the public interest therein, that any restraint thereon is, *ipso facto*, void, but, if the effect of the restraint be to form a monopoly of such business, or to prevent a public corporation from the performance of its chartered functions, then, the agreement is void.

The mere fact, therefore, that the business which was affected by the restraint, of the Trans-Missouri agreement was a business in which the public had a peculiar interest did not, *ipso facto*, render any restraint thereon invalid; nor did the agreement, on the other hand, violate in any manner the public policy of the United States as expressed in its statutes, or as declared by its courts.

The distinguishing characteristic of the Trans-Missouri agreement was the attempt to prevent thereby the secret undercutting of rates as published, and also to secure the same against sudden and arbitrary changes. There was no attempt to maintain rates at an agreed figure, if any party to the agreement gave public notice of an intention to adopt some other rate.

In considering the question as to whether or not the agreement under consideration is contrary to the public interests, it

¹ *H. & N. W. R. R. Co. v. N. Y. & N. H. R. R. Co.*, 3 Rob. 411; *State v. H. & N. H. R. R. Co.*, 29 Conn. 538; *D. & N. O. R. Co. v. N. A. T. & S. F. Co.*, 15 Fed. Rep. 650.

² *H. & N. H. R. R. Co. v. N. Y., N. H. & H. R. R. Co.*, 3 Robb, 411; *R. R. v. Ry. Co.*, 19 N. S. Eq. 113; 20 N. J. Eq. 542; *Stuart v. E. & W. Transportation Co.*, 17 Minn. 372; *Elkins v. R. R. Co.*, 36 N. J. Eq. 246.

³ *Richmond v. R. R. Co.*, 22 Iowa 191; *Ferry Co. v. R. R. Co.*, 73 Me. 391; *R. R. Co. v. R. R. Co.*, 110 U. S. 667; *R. R. Co. v. Pullman Southern Car Company*, 139 U. S. 79.

is submitted that we must not assume, *a priori*, that free and unrestricted competition of every description is, *ipso facto*, beneficial to the public at large. "It is a mistaken notion," said Vice-Chancellor Wood, "that the public is benefited by pitting two railway companies against each other till one is ruined, the result being at last to raise the fares to the highest possible standard."¹ But it must be admitted that the maxim as to free competition has been as prominent and as obtrusive in the minds of certain judges in their application of this branch of the law as King Charles' head was in Mr. Dick's literary efforts. Such was the *ratio decidendi* in *Hooker v. Vandewater*, 4 Deino, 349; *Stanton v. Allen*, 5 Deino, 434; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; and *G. & P. Ry. Co. v. The Sp. Ry. Co.*, 41 La. Ann. 970.

As a matter of fact, such a maxim has no part in modern political economy, and should have no part in modern jurisprudence. Have we not seen and heard enough of the benefits of free competition? Where is the benefit to the public in a rate war which reduces rates to a point insufficient to pay the operating expenses and fixed charges of a railroad and forces the road into a receivership? It is not urged that the railroads should be allowed to combine to charge excessive rates; but there is an adequate remedy for this in the machinery of the Inter-State Commerce Commission, and it is believed that the interests of the public are secured by such an agreement as that of the Trans-Missouri Freight Association.

There was nothing in it which sought to oppress the public. There was no agreement to maintain rates; in fact a means was especially provided by which any party to the agreement could lower its rate when it wished to. It was denied in the defendants' answer that they intended to unjustly augment those rates or counteract the effect of free competition, and as the cause was heard on bill and answer, the truth of the facts averred in the latter was undisputed. Surely there is nothing in such an agreement which is contrary to public interests. In fact it is in furtherance thereof. A somewhat similar agreement came for determination before the Supreme Court of New

¹ *Hare v. L. & N. R. Co.*, 2 J & H. Ch. Rep. 80, 103.

Hampshire and was unhesitatingly upheld.¹ No better statement of the fallacy of unrestricted competition can be found than the opinion of Blodgett, J., in that case. He says, *inter alia*, "For the lessons of experience, as well as the deductions of reason, amply demonstrate that the public interest is not subserved by competition which reduces the rates of transportation below the standard of fair compensation; and the theory which formerly obtained that the public is benefitted by unrestricted competition between railroads has been so emphatically disproved by the results which have generally followed its adoption in practice that the hope of any permanent relief from excessive rates through the competition of a parallel or rival road may, as a rule, be justly characterized as illusory and fallacious. Upon authority, [also, arrangements and contracts between competing railroads, by which unrestrained competition is prevented, do not contravene public policy."

If, then, the construction of the Act of 1890 advanced by the majority of the court renders that act unreasonable, is it not a mistake to prefer such a construction to one which will, in entire accord with public interests, amply protect the public against extortion, and at the same time enable the railroads to pay their debts, and to render a fair return to their shareholders, who, after all, are a part of that same public whose interests the court would so jealously guard.

George Stuart Patterson.

Philadelphia, May 1, 1897.

¹ M. & L. R. R. v. Concord R. R., 30 Atl. 383.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

A contract by an attorney-at-law to render services to prevent the finding of an indictment against one accused or suspected of crime is illegal and void, without respect to the belief of the attorney as to the guilt of the accused, and compensation stipulated to be paid for such services cannot be recovered: *Weber v. Shay*, (Supreme Court of Ohio,) 46 N. E. Rep. 377.

**Banks and
Banking.
Equitable
Assignment.
Cheques and
Drafts**

In *Fourth Street Natl. Bk. v. Yardley*, (Supreme Court of the United States,) 17 Sup. Ct. Rep. 439, the president of the Keystone National Bank of Philadelphia asked The Fourth Street National Bank, in the same city, to give his bank \$25,000 in clearing-house certificates, stating that it owed a large balance at the clearing house, which it could not meet, because its funds were in New York. He also exhibited a memorandum showing that his bank had a reserve fund of about \$27,000 in a certain New York bank, and proposed to give a draft thereon for the amount of the certificates. In reliance upon these representations and the memorandum, the certificates were delivered and the draft taken. The New York bank refused to accept the draft, and paid over the funds and turned over the collection items in its hands to the receiver of the Keystone Bank. The Fourth Street bank then brought suit against the receiver. The bill was dismissed, and that decree was affirmed by the Circuit Court of Appeals, 55 Fed. Rep. 850; but this latter decision was reversed by the Supreme Court, on the ground that though the mere giving of a bank cheque or draft in the ordinary course of business does not operate as an equitable assignment of the fund, it is competent for the parties to create such an assignment by a clear agree-

ment or understanding, oral or otherwise, in addition to the cheque or draft, that the transaction shall have that effect; that the facts in this case showed an equitable assignment of the fund, which would enable the drawee to claim it against the receiver of the drawer, which failed on the following day; and that the assignment operated not only upon cash actually owing by the New York bank at the time, but also upon money or drafts of the drawer in course of transmission or collection by it.

The Supreme Court of Wisconsin recently decided, that under Rev. Stat. Wis., § 4541, which provides that "any officer, director, stockholder . . . manager . . . **Receiving Deposits when Insolvent** or agent of any bank, who shall accept or receive on deposit or for safe-keeping or to loan, from any person, any money, or any bill, notes, or other paper, circulating as money, or any notes, drafts, bills of exchange, bank checks or other commercial paper for safe-keeping or for collection, when he knows or has good reason to know, that such bank . . . is unsafe or insolvent, shall be punished by imprisonment," etc., the receipt of money giving a certificate of deposit therefor, payable at a certain time, with interest, is receiving it on "deposit;" that it is immaterial that part of the sum thus received was a certificate of deposit given by the bank, and then due, with accrued interest thereon, which was then surrendered; and that to show the insolvency of a bank at the time an officer is charged with receiving a deposit, knowing of its insolvency, evidence of the amount of deposits with it at the time, and the amount of paper held by the bank, and the worthlessness of that paper, is admissible: *State v. Shaw*, 70 N. W. Rep. 312.

The inventory of the assignee of an insolvent banker, made within thirty days of the date of the assignment, (that being made one week after the receipt of the deposit,) is admissible in evidence on the trial of the assignor, a banker who had been indicted for receiving money on deposit when knowing himself to be insolvent. It is not conclusive, but it is a necessary step in the proceedings, tending to show the assets in the hands of

**Receiving
Deposits
When
Insolvent.
Evidence**

the assignee for the payment of debts: *Commonwealth v. Smith*, (Superior Court of Pennsylvania.) 4 Pa. Super. Ct. 1.

The by-laws of a building association, which provide that "loans on real estate may be repaid at any time on thirty days' notice," and that on default in interest for three months, or in insurance, taxes, or assessments on the day they fall due, the principal shall become due, apply only to out and out loans, and not to mortgages given to secure advances made by the association in redemption of stock, which are not to be repaid by the mortgagor: *Commercial Building & Loan Assn. of Richmond, Va., v. Mackenzie*, (Court of Appeals of Maryland,) 36 Atl. Rep. 754.

The argument of the court is hardly convincing. The word "assessments" stands in the way of its conclusiveness.

The Supreme Court of New Jersey has lately held, that a person entitled by the terms of his railroad ticket to "personal passage" in a railroad car, has not the right to carry with him packages of groceries for the use of his family; that the officers of the railroad company, after he enters the car, cannot lawfully take such packages from him by force; that the remedy of the company, after giving him notice to remove such packages from the car, and his refusal to do so, is to remove both the passenger and his packages, using no unnecessary force; and that if the officers forcibly take the packages from the passenger, and put them in the express or baggage cars, he can recover the value of his packages, and for the injury done to himself or his clothing, but nothing more: *Delaware, L. & W. R. R. Co. v. Bullock*, 36 Atl. Rep. 773.

When there are two customary routes from the point of shipment to the destination, one through a cold country and the other through a warm, and the latter route becomes obstructed, the carrier is negligent in sending over the cold route, without notice to the shipper or

consignee, goods which it is bound to know are destructible by frost: *Picree v. Southern Pac. Co.*, (Supreme Court of California,) 47 Pac. Rep. 874.

According to a recent decision of the Supreme Court of the United States, a trust created by conveyance of land to several persons, as trustees of an unincorporated association for the mutual aid of its members, with *habendum* to them "and their successors in office, forever, for the sole use and benefit of 'the association,' for a burial ground, and for no other purpose whatever," even if a charitable trust, is not for such a general purpose as could be executed *cy pres*, and it will end, at the latest, when the land ceases to be used as a burial ground, and the association is dissolved; that upon the termination of this trust, a resulting trust arises to the grantor and his heirs, and the trustees, or their heirs, hold the legal title to the land, charged with that resulting trust; and that the estate so resulting to the grantor and his heirs, since it does not arise under the grant, but by reason of the failure thereof, is not within the rule against perpetuities: *Hopkins v. Grimshaw*, 17 Sup. Ct. Rep. 401.

The Circuit Court for the District of Indiana has lately held, in accordance with the weight of authority, that the contract of a married woman, valid by the law of the place where it is made, is valid and binding upon her, although by the law of her domicile she is prohibited from making such a contract: *Bowles v. Field*, 78 Fed. Rep. 742.

A guarantee of her husband's debt by a married woman, which she could not make by the laws of Massachusetts, but could by those of Maine, contained in a note signed in Massachusetts, and mailed to the payee in Maine, has been held to be a Maine contract, and valid: *Milliken v. Pratt*, 125 Mass. 374, 1878; *Bell v. Packard*, 69 Me. 105, 1879. So, a married woman's bond, signed in Pennsylvania, prior to the married

Charitable
Trust,
Burying
Ground.
Cy Pres,
Resulting
Trust,
Perpetuity

Conflict of
Laws.
Contracts of
Married
Women

woman's act of 1887, and delivered in Delaware, accompanying a purchase money mortgage of real estate situated in Delaware, purchased by the married woman, was enforced against her in Pennsylvania, being a valid obligation in Delaware: *Benn v. Birchall*, 150 Pa. 164, 1892.

The Supreme Court of the United States has recently declared, that when a criminal convicted by a state court escapes and becomes a fugitive, pending his appeal to the state supreme court, it is competent for that court to order the dismissal of the appeal unless he shall surrender himself or be recaptured within sixty days; and the dismissal of the appeal at the end of the sixty days is not a denial of due process of law: *Allen v. State of Georgia*, 17 Sup. Ct. Rep. 525.

According to the same court, it is within the power of a state, in the absence of federal legislation on the subject, to forbid under penalty the heating of passenger cars within that state by stoves or furnaces kept inside the cars, or suspended therefrom, though such cars may be employed in interstate commerce; and this power cannot be affected by possible inconveniences resulting from the adoption of conflicting regulations by adjoining states: *N. Y., N. H. & H. R. R. Co. v. People*, 17 Sup. Ct. Rep. 418.

In the same case it was also held that Rev. Stat. U. S. § 5258, authorizing all steam railroad companies in the United States to carry freight, passengers, etc., from one state into another, and to connect with other roads so as to form continuous lines of transportation, does not interfere in any wise with the enactment of laws by the states to promote the safety of passengers, while traveling within their respective limits from one state to another, in cars propelled by steam, and that a statute forbidding the heating of passenger cars by stoves, on railroads of over fifty miles in length, is not such a discrimination against roads of greater length, as to amount to a denial of the equal protection of the laws, required by the Fourteenth Amendment.

A code adopted by a single act of the legislature, though it may contain inconsistent provisions, and one section may be modified by another, is not within the letter or spirit of the constitutional provision that no law shall be revised, amended or extended by reference to its title: *Ex parte Thomas*, (Supreme Court of Alabama,) 21 So. Rep. 369.

**Amendatory
Statutes.
Codes**

The Circuit Court for the Northern District of California has lately held, that the provision of the constitution of California, (Art. 12, § 22,) that the rates of charge fixed by the railroad commission shall be deemed conclusively just and reasonable in all controversies, civil and criminal; is in conflict with the Fourteenth Amendment, and therefore void: *Southern Pac. Co. v. Board of Railroad Comrs. of California*; 78 Fed. Rep. 236.

**Rates fixed
by Railroad
Commission**

In the same case the court laid down a number of rules for fixing rates of charge, the most important of which are (1)

That while a state has power to regulate railroad rates, that power, as well as the right of a railroad company to control its business, stops at injustice, the state having no right to fix a rate unreasonably low, though it may prevent the railroad from fixing one unreasonably high; (2) That rates for railroad transportation are not necessarily unreasonable, when they amount to practical confiscation, nor reasonable if they allow any dividend, however small; but a railroad company is entitled to be reimbursed its charges and expenses, and to receive, besides, an adequate return upon its investment; and (3) That in ascertaining the cost of operating a railroad, with reference to determining the reasonableness of rates, the expenses of operation are not to be strictly limited to the cost of running trains, excluding all betterments; but the cost of reasonable renewals and improvements of road-bed, track and equipment should be included in the operating expenses.

According to a late decision of the Supreme Court of Tennessee, a contract by which a manufacturer appoints a firm

Contract, Construction as a "special selling factor," to handle his goods, and under which all goods consigned are to remain the property of the consignor until sold at prices fixed by the consignor, the consignees to protect the consignor from any decline in price, and to have the benefit of any advance, and which also requires the consignees to remit for all goods consigned at the end of sixty days, whether sold or not, or whether collected for or not, and does not require any report made as to sales, is a contract of sale, and not of agency, in so far as it tends to affect the rights of third persons; and the consignor can neither impress a trust upon the property of the consignees for the proceeds of sales of such goods collected and used in their general business, nor claim the ownership of outstanding accounts against customers of such goods, as against other creditors: *Arbuckle v. Kirkpatrick*, 39 S. W. Rep. 3.

Enforcement, Personal Services A contract by which, in consideration of the purchase of stock in a corporation, the buyer is to be editor and manager and have control for a definite time of a newspaper published by the corporation, at a fixed salary, subject to his appointment and salary ceasing, and according to which the seller has a right to buy back the stock, if the buyer engages in other business, or the revenues of the paper fail to amount to a certain sum, is not a mere personal contract for services, which cannot be enforced in equity by enjoining any interference with his management and control; and though the buyer cannot be compelled to write editorials or exercise management over the newspaper, there is no such want of mutuality of remedy as will prevent the granting of an injunction to enjoin such interference: *Jones v. Williams*, (Supreme Court of Missouri,) 39 S. W. Rep. 486.

In the opinion of the Circuit Court for the Northern District of Illinois, a system of indexes, constituting a letter file, is not a proper subject of copyright: *Amburg File & Index Co. v. Shea*, 78 Fed. Rep. 479.

The Supreme Court of California has recently held, that a constitutional provision (Const. Cal., Art. 12, § 10,) which

**Corporations,
Lease,
Liability** prohibits the passage of any law permitting the leasing or alienation of any franchise so as to relieve the franchise or property held thereunder from liabilities contracted in the operation of that franchise, does not give the employe of the lessee of a corporation a right of action against the corporation for injuries received through the wrongful act of the lessee in the use of the leased property ; but that though an act of the legislature authorizes one railroad company to lease its franchises and property to another, the lessor company is liable to an employe of the lessee for injuries caused by the improper construction of the road : *Lee v. Southern Pac. R. R. Co.*, 47 Pac. Rep. 932.

**Directors,
Liability,
Failure to File
Report** If a person acts as director of a corporation, and fails to file an annual report, as required by law, he cannot escape personal liability to the creditors of the corporation on the ground that he did not hold the number of shares of stock requisite to qualify him for the position of director : *Donnelly v. Pancoast*, (Supreme Court of New York, Appellate Division, First Department,) 44 N. Y. Suppl. 104.

**Minority
Stockholders,
Relief** Minority stockholders, who cannot, through the directors or stockholders, obtain relief for the voting of excessive salaries to officers, are entitled to relief in equity, but in order to support a bill by them on that ground they must aver facts to show why the bill is necessary ; and the mere fact that these stockholders elected the seven directors does not warrant the presumption that those directors would refuse to discharge their duties to the corporation and the minority stockholders when requested, nor does the fact that an appeal to the stockholders would be unavailing excuse a failure to apply to the board of directors before filing the bill : *Dixie Mineral & Land Co. v. Palm*, (Supreme Court of Alabama,) 21 So. Rep. 315.

**Receivers'
Certificates,
Liens** Receivers' certificates, issued by the receiver of a purely private corporation, are not a charge upon the assets of the corporation in preference to existing liens, as against lienors who have not consented to their issue : *Doe v. Northwestern Coal & Transp. Co.*, (Circuit Court, D. Oregon,) 78 Fed. Rep. 62.



provision for the use of a cross to indicate choice is mandatory, that for putting a cross opposite the name of every candidate when a voter desires to vote for candidates in more than one list is merely directory; but that if a cross is put at the head of one party's list of candidates, and opposite the name of a candidate in another list for an office for which there is a candidate in the first list, the ballot will not be counted for either candidate for that office, but will be counted for all other candidates in the first list: *Dickerman v. Gelsthorpe*, 47 Pac. Rep. 999.

The second point was likewise ruled in *State v. Franshaw*, (Supreme Court of Montana,) 48 Pac. Rep. 1, where it was also held that when electors vote the official ballots supplied to them by the judges of election, their legally expressed will cannot be overthrown, if they are not at fault, by the fact that the officer who prepared the ballots in some way neglected his duty.

According to a recent decision of the Circuit Court of Appeals, Third Circuit, an electric light company, which maintains wires carrying an electric current of high power on poles used, in common with it, by other companies, for the support of their wires, owes to an employe of one of such other companies, who is lawfully upon the pole, in pursuance of the common right, the duty of exercising ordinary care to keep its wires so safely insulated as to prevent injury to that employe, though, in the performance of his work, he may enter upon a separate cross-arm of the electric light company or accidentally touch its wires: *Newark Electric Light & Power Co. v. Garden*, 78 Fed. Rep. 74. Acheson, Circuit J., dissented.

The Supreme Court of Texas has adopted the rule, held almost everywhere, that a conveyance of an expectant interest in an estate may be valid in equity; and that the assent of the ancestor is not essential to the validity of a conveyance by an heir of his expectant interest, particularly when he is *non compos mentis*: *Hale*

v. *Hollon*, 39 S. W. Rep. 287, affirming 35 S. W. Rep. 843.

If the transaction is fair, equity will uphold the conveyance of an expectant estate, and, if necessary, will enforce it, whether the ancestor assents or not. This rule prevails everywhere but in Kentucky: *Beckley v. Newland*, 2 P. Wms. 182, 1723; *Harwood v. Tooke*, 2 Sim. 192, 1809; *Cook v. Field*, 15 Q. B. 460, 1850; *In re Garcelon's Estate*, 104 Cal. 570, 1894; *Cleudening v. Wyatt*, 54 Kans. 523, 1895; *Curtis v. Curtis*, 40 Me. 24, 1855; *Quarles v. Quarles*, 4 Mass. 680, 1808; *Kenney v. Tucker*, 8 Mass. 143, 1811; *Trull v. Eastman*, 3 Metc. (Mass.) 121, 1841; *Bacon v. Bonham*, 33 N. J. Eq. 614, 1881, affirming 27 N. J. Eq. 209, 1876; *Stover v. Eydesheimer*, 3 Keyes, (N. Y.) 620, 1867; *Kinyon v. Kinyon*, 27 N. Y. Suppl. 627, 1894; *McDonald v. McDonald*, 5 Jones Eq. (N. C.) 211, 1859; *Bodenhamer v. Welch*, 89 N. C. 78, 1883; *Power's Appeal*, 63 Pa. 443, 1869; *Fritz's Estate*, 160 Pa. 156, 1894; *In re Kuhn's Estate*, 163 Pa. 438, 1894; *Fitzgerald v. Vestal*, 4 Sneed, (Tenn.) 258, 1856; *Steele v. Frierson*, 85 Tenn. 430, 1887; *Gore v. Howard*, 94 Tenn. 577, 1895; *contra*, *Wheeler v. Wheeler*, 2 Metc. (Ky.) 474, 1859; *Alves v. Schlesinger*, 81 Ky. 290, 1883; *McCall v. Hampton*, (Ky.) 32 S. W. Rep. 406, 1895.

The result of an autopsy on the body of one for whose death an action is brought is not privileged under a statute (Code Civ. Proc. Cal. § 1881, sub-d. 4.) which provides that "a licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." "A dead man is not a 'patient,' capable of sustaining the relation of confidence towards his physician which is the foundation of the rule given in the statute, but is a mere piece of senseless clay, which has passed beyond the reach of human prescription, medical or otherwise:" *Harrison v. Sutter St. Ry. Co.*, (Supreme Court of California,) 47 Pac. Rep. 1019.

Evidence.
Privileged
Communications

In *Jones v. German*, [1897] 1 Q. B. 374, the Court of Appeal has affirmed the decision of the Chief Justice, [1896] 2 Q. B. 418. (See 36 AM. L. REG. N. S. 138.)
Justice of the Peace, Search-Warrant, Legality In that case, a justice of the peace had issued a search-warrant, upon a sworn information stating that the informant had "just and reasonable cause to suspect and doth suspect that W. J. has in his possession certain property belonging to [the informant,] and that he has requested the said W. J. to allow him to search several boxes, which the said W. J. has had packed, ready to be taken away, and which he refuses to be looked through." The warrant was executed, and W. J. brought an action of trespass against the justice, alleging that the information was insufficient, and that the warrant was consequently illegal and without jurisdiction. The Chief Justice gave judgment for the defendant, and this decision was affirmed by the Court of Appeal, on the ground that a search-warrant may be issued on an allegation of reasonable suspicion of larceny; that it is not necessary to allege in the information that a larceny has in fact been committed, but that it is enough to allege a suspicion that a larceny has been committed; that it is not necessary to specify in the information the particular goods for which a search is desired; that the information in question substantially averred that the informant suspected certain property of his to have been stolen; and that it was sufficient to give the justice jurisdiction.

The arrogance of the labor unions has met with another rebuff. The Court of Appeals of New York has recently ruled that a contract between a **Labor Unions, Contract Compelling Employers to Join, Legality** brewers' association and a labor union, providing that no employe of the former should be allowed to work for more than four weeks without becoming a member of the latter, is an attempt to interfere with the right to pursue a lawful trade or calling, and hence is void as against public policy: *Curran v. Galen*, 46 N. E. Rep. 279.

A promise to repair, made by a landlord to his tenant during the tenancy, and with no other consideration than the tenancy, cannot be enforced : *Taylor v. Lehman*, (Appellate Court of Indiana,) 46 N. E. Rep. 84.

A landlord who lets an unfurnished house in a dangerous condition, he being under no liability to keep it in repair, is not liable to his tenant, or to a person using the premises, for personal injuries happening during the term, and due to the defective condition of the house : *Lane v. Cox*, (Court of Appeal of England,) [1897] 1 Q. B. 415.

According to the Supreme Court of Louisiana, an anonymous publication, made in the form of a printed pamphlet, which purports to be a reply to another communication, the authorship of which is not furnished, cannot be said to be libelous *per se*, as allegation and proof are required to connect that pamphlet with the complainant ; and when one's methods of teaching have been unduly criticised by a rival who pretends to superiority, color is given to the excuse of making a reply, and the recrimination, if kept within reasonable bounds, is not libelous, or at any rate, the parties are *in pari delicto*, and the aggressor cannot complain : *Melly v. Soule*, 21 So. Rep. 593.

The complaint in this case alleged that the following parts of the pamphlet referred to were libelous : First, the quotation heading said pamphlet, " Oh what a tangled web we weave, when first we practice to deceive ; " Second, the comparison of the petitioner's circular to one termed elsewhere in the pamphlet a " charlatan " teacher ; Third, the application of the adjective " smattering," to the course of book-keeping taught by the petitioner ; Fourth, the allegation that the petitioner's course was " copied and worked " from a treatise on book-keeping by one R. A. Wright, " the noted eighteen-hour charlatan teacher ; " Fifth, the use of the adjectives " delusive " and " decoying " with reference to the petitioner's circular ;

and Sixth, a quotation from Dante's Inferno, as to the punishment of impostors in the tenth gulf of Hades. The opening sentence of the pamphlet was as follows: "A very pretentious teacher of book-keeping in this city, whom we will designate as the 'No Nonsense' teacher, has woven a tangled web, long and wide, by publishing many erroneous and deceptive statements of his superficial course."

The Supreme Court of New Hampshire has held the following newspaper article libelous, as tending to subject the plaintiff to contempt and ridicule:

Contempt

"Giles, a Manchester man, has relieved his mind to Bryan by O. K.-ing New Hampshire. Now let the procession move."—*Nashua Press*.

"Avast there, you lubberly liar! Giles a Manchester man! not by eighteen full length miles. He's a Concord man, from the sole of his cloven hoof to the crown of his cranky head. Then why do you pin him upon the map of Manchester? What have we done that you put such an indignity as that upon us? Haven't we trouble and annoyances enough without him? Aren't B——and P——and C——our share? Isn't the Bowery about all our reputation will bear? Giles a Manchester man! Impossible. Nothing has escaped from Barnum's aggregation of humbugs and featherheads. General W——'s collection of exhibition apes hasn't arrived, and F——didn't comb anything out of his head while he was here. There is no imaginable source from which Giles could have come to Manchester. We have had the freshet, the insect pest, the drouth, O——, F——, and a great variety of other unwelcome visitations this summer, but thus far we have escaped Giles:" *Giles v. John B. Clarke Co.*, 36 Atl. Rep. 876.

In *Bennett v. Salisbury*, (Circuit Court of Appeals, Second Circuit,) 78 Fed. Rep. 769, a newspaper proprietor, residing in Europe, established for the guidance of his employes a rule that communications of a personal nature sent by unknown correspondents must be verified on investigation by an accredited correspondent, and, when so verified, might be published. In an action based upon

Newspaper
Publication.
Falsity,
Malice

a scandalous story, thus received, verified, and published, but which was utterly false, the court held that it was properly left to the jury to determine whether the rule evinced such wanton disregard of another's right, and such reckless indifference to consequences, as to be equivalent to malice, which would authorize the recovery of primitive damages.

A false charge of criminal misconduct against an officer is not privileged because he is a candidate for election to a public office : *Fork v. Homan*, (Court of Civil Appeals of Texas,) 39 S. W. Rep. 210.

The Supreme Court of the United States has just rendered one of the most important decisions of recent years ; and it is to be regretted that the court was not more nearly unanimous. In *United States v. Trans-Missouri Freight Assn.*, 17 Sup. Ct. Rep. 540, it held, reversing 58 Fed. Rep. 58, against the dissent of Justices White, Field, Gray and Shiras, that the act of July 2, 1890, (26 Stat. at Large, c. 647 ; Suppl. Rev. Stat. U. S. p. 762,) which provides that " every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal," includes all contracts or combinations operating in restraint of trade or commerce, whether they be such as were held legal or illegal at common law, and whether the restraint imposed is reasonable or unreasonable ; that it therefore applies to a contract between competing common carriers by rail, forming an association for the purpose of maintaining and regulating rates of transportation, as such agreements were not authorized or sanctioned by the interstate commerce act of February 4, 1887, and there is consequently no inconsistency between the two acts ; and that an agreement between a number of competing railroads engaged in interstate traffic " for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local," and forming an association to prescribe rates which, when agreed to, are to govern all the companies, and a violation of which

Monopolies,
Trust
Combinations,
Railroad
Traffic
Associations,
Interstate
Commerce

subjects the defaulting company to a pecuniary penalty, is an agreement or combination in restraint of trade or commerce, in the meaning of the anti-trust law, though each party to the agreement may withdraw therefrom on giving thirty days' notice.

If a purchaser of the equity of redemption on mortgaged premises agrees to pay the mortgage as a part consideration for the purchase price, upon the representation of the grantor that there are no judgments or liens outstanding against the grantor or the property, and pays the mortgage accordingly, but subsequently discovers that there is a judgment against the grantor, recovered subsequent to the date of the mortgage, which is still a valid lien upon the property, he will be entitled to subrogation to the rights of the mortgagee against the mortgagor, if the rights of the judgment creditor are not affected thereby: *Johnson v. Toodle*, (Supreme Court of Utah,) 47 Pac. Rep. 1033.

In *In re Gribben*, 47 Pac. Rep. 1074, the Supreme Court of Oklahoma recently declared void, on the ground that it was unreasonable, was not essential or indispensable to the carrying into effect of any of the purposes for which a city is created, and was oppressive and in contravention of common rights, the following ordinance intended to interfere with the operations of the Salvation Army: "The making of any noise upon the streets or sidewalks of the city, by means of drums or musical instruments or otherwise, of such a character, extent and duration as to annoy and disturb others, is hereby prohibited; and it is hereby made the duty of the mayor and the city marshal to order any person or persons, making such noise, to desist therefrom, and the failure of or refusal of such person or persons to promptly obey such order of the mayor or city marshal is hereby declared to be a misdemeanor, and upon conviction thereof such person or persons shall be punished by a fine of not less than five dollars and not more than one hundred dollars."

dred dollars for each offense, in the discretion of the court, and shall be imprisoned in the county jail until such fine and cost of the prosecution are paid.

In the opinion of the Supreme Court of New Jersey, the councils of a municipal corporation, whose charter provides that the councils may make ordinances to regulate the public streets to prevent immoderate driving or riding, to provide the manner in which corporations or persons shall exercise any privilege granted to them in the use of the streets, to regulate the running of locomotive engines and railroad cars therein, and to protect persons and property, has power to enact an ordinance that all passenger cars operated by trolley or electric power in the streets of the city shall have proper and suitable fenders on the front of such cars to prevent accident, and that it shall be unlawful to operate such cars in the streets of the city without such fenders: *State v. City of Cape May*, 36 Atl. Rep. 696.

The Supreme Court of the United States has lately held, that a stockholder of an insolvent national bank may bring a suit in a state court, in behalf of the bank and himself, as a representative stockholder, against the directors, to recover money alleged to have been lost through their negligence and breach of trust, when the bank's officers, the receiver, and the comptroller of the currency, have all refused to bring such a suit: *Ex parte Chetwood*, 17 Sup. Ct. Rep. 385; and that one who appears upon the official list of the names and residences of the share holders of a national bank only as "pledgee" of a specified number of shares of the capital stock of that bank, nothing else appearing, is not a shareholder within Rev. Stat. U. S. § 5131, and is not subject to the liability imposed by that section upon shareholders of national banks: *Pauky v. State Loan & Trust Co.*, 17 Sup. Ct. Rep. 465, affirming 58 Fed. Rep. 666.

The last mentioned court has also decided, reversing 78 Fed. Rep. 175, that the provisions of Rev. Stat. U. S. § 5283,

Neutrality
Laws,
Violation,
Assisting
Insurgents

which forbids the fitting out and arming of a vessel with intent that she shall be employed in the service of any foreign prince or state, "or of any colony, district, or people," include any insurgent or insurrectionary body of people acting together and conducting hostilities, though their belligerency has not been recognized: *The Three Friends*, 17 Sup. Ct. Rep. 495.

Newspaper,
What
Constitutes

The Supreme Court of New York, at Special Term, for Erie County, has recently held that the *Daily Mercantile Review*, published in sheet form in the city of Buffalo, having a circulation of 1,500 copies in the county and 3,600 elsewhere, and containing several columns daily of news matter of general interest, and advertisements of all kinds, is a "newspaper" in which notices of foreclosure sales may be published, within the meaning of the Code of Civil Procedure, § 1678, though it is chiefly devoted to market reports, financial and mercantile items, local court proceedings, and lists of instruments recorded, and is sold only by subscription: *Williams v. Corwell*, 43 N. Y. Suppl. 720.

Parties who make and advertise for sale in their catalogue, as an independent device, one part of a patented combination, which part is valuable only in connection with the other elements of the combination, are guilty of contributory infringement: *Thomson-Houston Electric Co. v. Ohio Brass Co.*, (Circuit Court, N. D. Ohio, E. D.,) 78 Fed. Rep. 139.

Patents,
Contributory
Infringement

In *Griffuss v. Corrigan*, (Supreme Court of Wisconsin,) 70 N. W. Rep. 306, S., the owner of a majority of the stock of a mining company and of a furnace company, caused the furnace company to issue, without consideration, but with no fraudulent intent, storage warrants in the usual form of warehouse receipts on the iron in its yards in favor of the mining company; but there was no actual delivery of nor agreement to purchase the iron. These warrants were delivered by S., as president of the mining company, to a bank, which took them

Pledge,
Storage
Warrants,
Non-Delivery

in good faith, as collateral security for a loan. Some time after the issue of these warrants, a creditor of the furnace company levied upon and sold the iron under a judgment for advances to the furnace company. The assignee of the bank then sued the creditor to recover the value of the iron. The court below found for the plaintiff, but this judgment was reversed by the Supreme Court, which held that the bank acquired no rights superior to the creditor, because (1) the storage warrants were not warehouse receipts, not being issued by a warehouseman storing goods for compensation; (2) they were not valid as chattel mortgages, not being such in form, nor filed, as is required in cases of such mortgages; and (3) they were not sufficient as contracts of pledge, because there was no delivery of the iron.

Whisky sold as a beverage or commercial commodity, by one who is neither a druggist nor pharmacist, has been held to be within the provisions of the Ohio Pure Food Law which provides:

Pure Food
Law.
Whisky

§ 1, That no person shall, within this state, manufacture for sale, or offer for sale, or sell any drug or article of food which is adulterated within the meaning of this act.

§ 2. The term drug as used in this act, shall include all medicines for internal or external use, antiseptics, disinfectants and cosmetics.

And if it is not of the prescribed degree of purity, the vendor will be liable to the penalties of the act: *State v. Hutchinson*, (Supreme Court of Ohio,) 46 N. E. Rep. 71.

In *Central Trust Co. v. Carter*, (Circuit Court of Appeals, Fifth Circuit,) 78 Fed. Rep. 225, the holders of the bonds of an insolvent railway company entered into a trust agreement with certain persons constituting a reorganization committee, and a trust company, by which the reorganization committee was authorized, in very broad terms, to procure the sale of the railway; to adjust, by arbitration or

Railroad
Companies,
Reorganization
Agreement,
Authority of
Reorganization
Committee

otherwise, the rights of a construction company which had contracted to build the road; to negotiate and compound with holders of claims against the railway, and provide for payment thereof; and to borrow money, and pledge as security the bonds deposited under the agreement. This committee entered into an agreement with certain parties holding claims against the railway company and the construction company, some of whom had obtained judgments declaring contractors' liens in their favor against the railway company, by which agreement these claims were assigned to the committee, and certain securities of the railway company, held by the construction company, were released in consideration of the promise of the committee to deliver to such claimants negotiable certificates for certain sums, payable in cash, and secured by the bonds deposited with the committee. The claimants performed their part under this agreement, but the committee never delivered the certificates. Subsequently the railway was sold under foreclosure, and upon an intervening petition by the claimants who had assigned their claims to the committee, the court decreed that they were entitled to be paid the amount of the promised certificates out of the proceeds of sale applicable to the payment of the bondholders. The trustee for the bondholders appealed from this decision. But the Circuit Court of Appeals held that the agreement with the claimants, who had at least apparent right against the railway, was within the authority of the reorganization committee, and that in spite of the fact that the certificates were never delivered, the agreement should be treated as a mortgage on the bonds, and the claimants were therefore entitled to be paid out of the proceeds of the sale.

In *Missouri K. & T. Ry. Co. v. Miller*, 39 S. W. Rep. 583, the Court of Civil Appeals of Texas recently held, in accordance

Negligence,
Person
Assisting
Another on
Train

with the weight of authority, (1) That when a person is permitted, without objection, to enter a car in a railway train, at a station, to assist a passenger to a seat, and before entering, states to the conductor that he intends to get off, it is the duty of the conductor to so regulate the movement of the train as to give

him a reasonable time to leave the car without injury; (2) That if such information is given to a porter or brakeman, and the conductor in starting the train acts upon the statement of the porter or brakeman that it is "all right," the railroad Company is chargeable with the notice given that the person desired to leave the train, as if it had been given to the conductor directly; and (3) That the absence of any rule forbidding it and of any objection on the part of those in charge, operates as a consent on the part of a railroad Company that a person not a passenger may enter one of its cars for the purpose of assisting a passenger to a seat.

Land conveyed to a corporation in fee does not revert to the grantor or his heirs, on the extinction of the corporation; and it makes no difference in this regard that the existence of the corporations is limited by law to thirty years: *Wilson v. Leary*, (Supreme Court of North Carolina,) 26 S. E. Rep. 630, overruling *Fox v. Horah*, 1 Ired. Eq. (N. C.) 358, 1841.

In *Curry v. Lasell Seminary Co.*, (Supreme Judicial Court of Massachusetts,) 46 N. E. Rep. 110, the plaintiff sent her daughter to the defendant's school, agreeing to be bound by the conditions of the catalogue, which provided that scholars should not be absent from school except at regular recesses. On one occasion the plaintiff's request that her daughter be allowed to spend Sunday with her, which had been granted on several previous occasions, was denied. She took her daughter with her in spite of this refusal; and when she brought her back the school authorities refused to allow her to remain any longer in the school, unless the plaintiff would accept their interpretation of the contract, which was that the officers of the school had absolute discretion to determine when pupils should be permitted to be absent. The plaintiff refused to accept this construction, took her daughter away, and sued to recover the money she had advanced for board and tuition.

The trial court directed a verdict for the defendant; and this was affirmed, the court holding that the regulation as to absence, as construed by the defendant, was reasonable, and that the defendant was not obliged to permit the plaintiff's daughter to remain in the school, unless she would consent to be bound by it.

Specific performance will not be decreed of a contract to convey "a house and lot," when the house has only three walls, the beams and girders being inserted on the fourth side into a wall on the lot of an adjoining owner, though the vendor has a prescriptive right to the use of the wall for that purpose: *Spero v. Schultz*, (Supreme Court of New York, Appellate Division, First Department,) 43 N. Y. Supl. 1016.

An act which authorizes a vehicle license by cities, provided it shall only apply to vehicles used in the transportation of goods and merchandise, and for hire at public stands, and by livery stables, does not authorize a tax on a bicycle used only by its owner for pleasure: *Davis v. Petrinovitch*, (Supreme Court of Alabama,) 21 So. Rep. 344.

A writing purporting to be the joint will of two persons cannot be probated as such in the life of one of them; but a writing jointly executed by two persons, purporting to be their will, devising to a third person lands, parts of which belong to each, can be proved as the separate will of one, on his death, while the other is still living: *In re Davis's Will*, (Supreme Court of North Carolina,) 26 S. E. Rep. 636, overruling *Clayton v. Liverman*, 2 Dev. & Bat. L. (N. C.) 558, 1837.

In a recent case before Reeves, J., of the Chancery Division, a testatrix had bequeathed to her husband a life interest in certain real estate, and gave him "power to dispose of all such property by will amongst our children." The will contained no gift over in default of appointment. There were children, but the husband died intestate without having exer-

Gift for Life,
Power of
Appointment,
Neglect to
Exercise
Power

Joint Wills,
Probate

Taxation,
Bicycles

Specific
Performance

cised the power of disposition. Upon these facts, the judge held that when there is a gift to one for life, with a power to him to appoint among a class, but no gift to the class and no gift over in default of appointment, the court is not bound, without more, to imply a gift to the class in default of the exercise of the power; that in this case the power conferred on the husband was a mere power and not one coupled with a trust; and that consequently there was no gift to the children by implication, and that the heir at law of the testatrix was entitled: *In re Weekes's Settlement*, [1897] 1 Ch. 289.

Ardemus Stewart.

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THE POWER OF A CORPORATION TO PURCHASE AND HOLD STOCK OF ANOTHER CORPORATION. This old question arose for fresh consideration upon a somewhat extreme state of facts in the recent case of *First National Bank of Concord v. Hawkins*, (C. C. A. 1st C.) 79 Fed. 51. A national bank had purchased as an investment 100 shares of the capital stock of another bank, and for a number of years had held them and drawn dividends. In 1893 the latter bank was declared insolvent and went into the hands of a receiver, and an assessment of \$100 was ordered on each share of the stock under the National Banking Acts. The defendant bank declined to pay this assessment on the ground that it had no power, under the law of its creation, to acquire the stock of another national bank as an investment; but the Circuit Court of Appeals, in deciding the case, held that it was not necessary to consider this proposition. They took the view that as the bank had full power to loan on the stock as collateral, or to take it in compromise of a doubtful claim,

and in either case to have the stock transferred in its own name absolutely, therefore no illegality appeared on the face of the transaction, and there was nothing to inform either the bank whose stock it acquired, or existing or future creditors, or the controller of the currency, that the transaction was not within the scope of the undoubted powers of the defendant. And the court decided that, this being the case, the unquestioned trend of decisions in the United States Supreme Court was that the bank is estopped to deny its liability.

It would seem that the court is supported in its decision by *dicta* of the Supreme Court, although there are no cases decided squarely on the point. The court in deciding the case of *First National Bank v. National Exchange Bank*, 92 U. S. 112, while admitting the power of a national bank to compromise a doubtful debt by taking stock of another bank, used language that would seem to negative its power to take such stock for ordinary purposes, saying: "Dealing in stocks is not expressly prohibited, but such a prohibition is implied from the failure to grant the power." In *Germania National Bank v. Case*, 99 U. S. 628, the question again before the court was of the power of a national bank to make a loan with the stock of another bank pledged as collateral security, and the power was, of course, supported. In its opinion, however, the court seems to have gone beyond what was necessary for its decision of the case, saying: "There is nothing in the argument on behalf of the appellants that the bank was not authorized to make a loan with the stock of another bank pledged as collateral security. That is an ordinary mode of loaning, and there is nothing in the letter or spirit of the National Banking Acts that prohibits it. But, if there were, the lender could not set up its own violation of law to escape the responsibility resulting from the illegal action." It was upon this language that the court placed most reliance in deciding the present case.

There can be no doubt of the power of a corporation to take the stock of another corporation in settlement of an old debt: *First Nat. Bank v. National Exchange Bank*, (*supra*). But whether it can hold such stock as security for a current loan, or whether it may subscribe for, purchase, or hold such stock for ordinary purposes is more in doubt. The better opinion in this country seems to be that it cannot: *Franklin Co. v. Inst. for Savings*, 68 Me. 63; *National Savings Bank v. Meriden Agency Co.*, 24 Conn. 159; *Nassau Bank v. Jones*, 95 N. Y. 115; *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047; *Franklin Bank v. Commercial Bank*, 36 Ohio, 350; *Clark on Corporations*, 151 to 153; *Thompson's Commentaries on the Law of Corporations*, Vol. I., §§ 1102 to 1111. With reference to this prohibition it was said, in one of the above cases, "Were this not so, one corporation by buying up a majority of the shares of the stock of another could take the entire management of its business, however foreign such business might be, to that which the corporation purchasing such shares was created to carry on."

But, while this is the view apparently supported by the weight of American authority, and certainly by the text-book writers, there is not wanting the best of authority on the other side: *In re Asiatic Banking Corporation*, L. R. 4 Ch. App. 352; *Calumet Paper Co. v. Stotts Inv. Co.*, (Ia.), 64 N. W. 782. And one California case has decided that a corporation may be created for the express purpose of dealing in stocks, in which case it may, of course, purchase and hold them: *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 48 Pac. 225.

BOOK REVIEWS.

HAND-BOOK OF THE LAW OF PARTNERSHIP. By WILLIAM GEORGE. Hornbook Series. St. Paul, Minn.: West Publishing Co.

This work is one of the latest products of that inexhaustible mine of legal publications, the West Publishing Co. As a concise and probably accurate summary, in a series of legal propositions, of nearly five thousand cases, it has its value. It is not, however, a book for the jurist or the student, both of whom demand a more scientific and historical discussion of the cases.

As a contribution to the science of the law, this volume is not worth the paper it is printed on, but, as a guide-book to the leading cases on the subject, and a *vade mecum* for the cramming student, it will, no doubt, be useful to many. R. R. F.

A TREATISE ON MECHANICS' LIENS. By LOUIS BOISOT, Jr., A.B., LL. B., of the Chicago Bar. St. Paul, Minn.: West Publishing Company.

It seems almost a hopeless task to embody in a treatise a subject so entirely statutory as that of Mechanics' Liens. The law of different jurisdictions is so contradictory and so subject to change, that one can never be sure what it really is. A considerable part of the Pennsylvania law, for example, as given by Mr. Boisot, is ancient history already.

The nature of the subject also puts unfortunate limitations on the author's style. The expressions, "where the statute provides," "under a statute requiring," etc., etc., are used to a wearisome extent, occurring as often as half a dozen times to the page. On page 408, § 418, it is said, "Where the statute expressly requires the claim to set forth the times when the material was furnished, or the labor performed, an omission of such allegations renders the lien void. . . . But, where the statute does not expressly require the claim to give the dates of the account, such dates need not be

stated." These sentences, chosen at random, furnish a fair sample of the prevailing style of the book.

As a digest of the law on Mechanic's Liens, as it existed at the time of writing, the work is of great value. Its arrangement is excellent, its treatment exhaustive, and typographically it is perfect.

R. IV.

THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES.
By SYDNEY GEORGE FISHER. Philadelphia: J. B. Lippincott
Co. 1897.

The above volume, as the author states, is devoted to the exposition of our Constitution as a development of progressive history, and not an isolated document struck off at a given time or an imitation of English or Dutch forms of Government.

Mr. Fisher shows, in a very interesting and convincing way, that the different provisions of the constitutions are the direct result of the experience of the people of the Colonies in attempting to govern themselves. For this purpose he traces the forms of government from the original trading corporations with their extremely simple machinery, to the developed and comparatively perfect colonial constitutions of 1776. The author shows how every provision of importance in the national constitution was foreshadowed in some of the earlier documents, and was given a practical test by the colonies. He shows, further, that these provisions were not copies of the expedients of other foreign governments but were worked out independently and to meet given needs as they arose. He thinks that, in a majority of the instances, where our institutions are similar to those of England the similarity is a coincidence and not an imitation. The book is scholarly, thoughtful and convincing, and may serve to unsettle some of the accepted canons of constitutional interpretation. It shows a vast amount of investigation and study of a literature which is in itself none too attractive, and a careful comparison and summary of it for the benefit of those who have neither the time nor the facilities for consulting it. *O. J. R.*

BOOKS RECEIVED.

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TREATISES.

COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, HISTORICAL AND JURIDICAL. By ROGER FOSTER. Three Volumes. Vol. I. Boston: The Boston Book Co. 1895.

AMERICAN RAILROAD AND CORPORATION REPORTS. Edited by JOHN LEWIS. Vol. XII. Chicago: E. B. Myers & Co. 1896.

THE ELEMENTS OF JURISPRUDENCE. By THOMAS ERSKINE HOLLAND, D.C.L. Eighth Edition. Revised. New York: The MacMillan Co. 1896.

HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS. By WILLIAM L. CLARK, JR., Instructor in Law in the Catholic University of America, etc. St. Paul, Minn.: West Publishing Co. 1897.

DOMESDAY BOOK AND BEYOND. THREE ESSAYS IN THE EARLY HISTORY OF ENGLAND. By FREDERIC WILLIAM MAITLAND, LL.D., Downing Professor of the Laws of England in the University of Cambridge, of Lincoln's Inn, Barrister-at-law. Boston: Little, Brown & Co. 1897.

THE FEDERAL COURTS. THEIR ORGANIZATION, JURISDICTION AND PROCEDURE. Lectures before the Richmond Law School, Richmond College, Va. By CHARLES H. SIMONTON, U. S. Circuit Judge. Richmond, Va.: B. F. Johnson Publishing Co. 1896.

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THE TRUE DOCTRINE OF ULTRA VIRES IN THE LAW OF CORPORATION. By REUBEN A. REESE, Esq., of the Colorado Bar. Chicago: T. H. Flood & Co. 1897.

A TREATISE ON THE AMERICAN LAW OF GUARDIANSHIP OF MINORS AND PERSONS OF UNSOUND MIND. By J. G. WOERNER, author of American Laws of Administration. Boston: Little, Brown & Co. 1897.

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INTERNATIONAL. LAW.*

It may not be inappropriate,—it is certainly encouraging—to preface the discussion of legal subjects by the payment of tribute to the greatness and glory of our common profession. Here, at least, we shall all agree, differing perhaps from a considerable portion of the human race in our estimate, but asking for no better evidence of its exceeding usefulness than the denunciation and ridicule which have been showered upon it from immemorial time. Great wits and small ones have honored our calling by their malice and shown its strength by the innocuous results that followed the discharge of their noisy, but harmless artillery. Great kings have found that they could subdue armies, fetter the press, and dazzle the world by their exploits, yet fail to conquer the Bar. Napoleon himself, the Titan of modern times, was helpless before it, and failed to cajole, or terrify it into silence. He could make decrees from Berlin and from Moscow, and direct the passage of such laws as he deemed wise to have enacted, but in the end, it was the lawyer who interpreted those laws and construed those decrees. For the Law is the spiritual monitor and guide of nations, nay, the spiritual life itself: her ministers, however

*Address delivered before the alumni and students of the Law Department of the University of Pennsylvania.

unworthy, cannot but represent some of her majesty. The Law is the concrete expression of Justice; the great ligament that holds communities together; the Advocate is her mouth-piece and interpreter. His the function to keep alive the fires of human liberty, and as he succeeds or fails in this so shall the honor of the bar rise or fall. The Law is the antithesis of Force; they cannot co-exist on equal terms. Force may triumph for a day, but only for a day. As with the passing centuries, the world grows wise, it learns the lesson more deeply, that Force is the most expensive and most costly, the most uncertain of expedients for righting a wrong. The poet-philosopher of the Augustan age boasted as one of the titles to glory of his imperial master; that the Forum was free from law suits. A golden age, indeed, if the absence of litigation really meant that men honestly performed their obligations without coercion; a happy state, the existence of which we may well doubt. Perhaps the knowledge that Courts did exist, which were opened to the oppressed and injured, might account for this phenomenon; perhaps stagnation in the lawyers' business meant that the general activities and enterprise were paralyzed by war and the pursuit of glory: perhaps, too, the poet exaggerated, as poets sometimes will. We must remember that the Bar of that day resembled only in name the Bar of to-day. Justice, with bandaged eyes holding the impartial scales with firm and steady hand, stands as our emblem. Apollo, slaying Marsyas who had dared to compete with him in performance on the flute, stood in front of the Roman Rostrum, a ghastly spectacle, indeed; but whether a warning to the client or his counsel History does not tell. Even this cruel operation could not cure the flute player of his love for art, nor rob him of his gifts. At least, tradition says that after it had been performed, and the hapless artist bereft of his natural covering, the latter was turned into a bag, and when filled with air gave out sweet sounds if moved by the musical waves of a melodious flute. Thus did the victim against lawless violence protest, and as far as might be discourse in favor of the Liberty of Speech.

The history of a free people is the history of its Bar. No

nation, at least in modern times, has ever achieved its freedom without the aid of the Advocate. With us this is a truism, and needs no demonstration. From the earliest days we find our brethren in season and out of season, at the risk of life and liberty using their gifts in favor of freedom and against oppression. While we note with regret that the greatest of our national heroes, Washington himself, had not been provided with a legal education, it is to his credit that he surrounded himself with eminent lawyers, such men as Jefferson, Hamilton, Adams, and took their counsel. With these men to guide him, personal knowledge of the law was scarcely necessary. He was able to act judicially, and, as often happens with good and honest judges, the abundance of learning in the counsel, supplemented any lack of learning in the Court itself.

That there is nothing in legal training to unfit the Advocate for sterner duties in the field, a roll of honorable names, conspicuous in war and peace alike, is with us to prove: the truth is shown in our history that patriotism and devotion are not enfeebled by the pursuit and mastery of legal studies. *Cedunt arma togæ* is not more true than the converse of the proposition. The same men have dropped or taken up the toga or the sword as the necessities of the nation demanded; they have promoted the arts of peace, and have stood out as the leaders in the conflicts of war, eminent and great in both alike.

But it is especially in our own day that the usefulness of the Bar has been conspicuous and important. The close relations of different nations have removed ancient prejudices and quickened latent sympathies into vigorous life. War has become less frequent, not only, I might say not so much, because of the growing regard for human life and impatience of human suffering, but because of the commercial spirit that has taught men to calculate the cost of armed conflicts. Few nations can afford to spend the money necessary for the outfit of an army. It was easy enough and cheap enough to send one hundred thousand men into the field so long as they could use the muskets that their fathers had used, or the spears

and swords that were deadly enough but inexpensive. When, however, the changing fortunes and feverish competitions of rival nations require endless novelty in guns, fortifications, methods of transportation, of attack and of defense, greater care for the injured, better food for those who do the fighting and less freedom in dealing with the property of non-combatants, a new order of things arises. The perplexities of Rulers serve to keep the Temple of Janus closed. Homicide becomes absurdly expensive. Glory loses prestige as the cost and risk rise to unheard of proportions. Personal prowess hesitates when rifles kill at 6,000 yards, strong towns lose their confidence when Krupp guns thunder destruction before they are in sight and treat ancient defenses with brutal and ruinous contempt. The Banker in Lombard or Wall street raises his voice and threatens to cut off the needed supplies, while the degenerate combatant prefers the farm or the workshop to the hazards and discomforts of a campaign in midwinter. The instinct of destruction is still present, for men are still human, the temptation to invoke the *ultima ratio* of kings still agitates the breast of rulers, but fear of results is as potent as the love of peace. They arm millions of men to show that they are ready for war, while year after year they proclaim their pacific purposes, and their readiness to enforce these purposes at the cannon's mouth.

There is, indeed, no more instructive and edifying spectacle than this long-continued abstinence from war when so many are ready to accept it, if only some one of the parties will throw down the gauntlet. Fermentation thus indefinitely protracted without explosion is a novel and cheering spectacle which must fill the world with amazement and the Bar with pride.

For, it must be remembered, the self-denial of Emperors and Kings does not remove the causes of irritation which once required blood-letting in nations as in persons. Differences will inevitably arise. The ambition of the strong is not dead, the sharp line between right and wrong is not more manifest to-day than in the past. Weak nations are as apt as ever to offend by their aggravating debility, while territorial

expansion appeals with ever-increasing eloquence to great and small. The rush to Africa and the eager haste of the Powers to seize a share of the Dark Continent without a dangerous filip to the susceptibilities of rivals is an illustration of this. The old countries are being sorely crowded. America objects to being partitioned, and the chief of American nations does not hesitate to file a *lis-pendens* on the hemisphere. A war between any two powers might involve the world in a destructive conflagration wherein old landmarks might be obliterated and venerable constitutions shrivelled up like a scroll before the fire. How, then, shall the world settle its quarrels and contentions, save by calling the lawyers to talk the matter over, and to arrange affairs according to the principles of "natural justice?" True, no man has yet been found who could, or at least would, accurately define what these principles are, where they begin, and where they end, what their origin, and how they sprang into life or grew into recognition. Their starting-point is a mystery, their development, if they be what they claim, is a misnomer. But, fortunately for the world, a shibboleth need not be intelligible: perhaps, it commands respect in the inverse ratio to its intelligibility. Its plasticity recommends it to those who might refuse their acceptance if all agreed as to its meaning. Even to-day, although International Law, so called, has reached the high water-mark of fashion and popularity, who will venture a definition? Is it a science at all, is it in any sense a law, or a system? How can that be a law which finds no place for a superior or an inferior, which recognizes no sanction, submits to no tribunal, and shows itself in the critical periods of Modern History to have been little more than a harmonious setting to modern music of excellent rules which are easily misunderstood, more easily evaded and most easily perverted to base uses.

The eminent Lord Chief Justice of England has within the year added his own definition to the many which had heretofore been presented as solving the problem. Lord Russell says that "International Law is nothing more nor less than what civilized nations have agreed shall be binding on o

another as International Law." A higher authority for a legal definition could not easily be found, not only because of the eminent judicial position of the author, but because of his cultured abilities, his large experience and known keenness of analysis. If we must abide by any one attempt at definition, we might, out of respect for the great jurist who honored us with his presence a few months ago, accept this formula. It is at least free from affectations of speech; it does not offend by any effort to cover up faults of substance with ambition of language. And yet, if it be not improper here to suggest a doubt as to the practical aid thus given us, we might well ask ourselves if, owing to the inherent difficulty of the task, this eminent jurist has not failed to simplify the subject to any appreciable extent.

"What civilized nations have agreed shall be binding on one another," is International Law. This seems so obvious that criticism blushes at fault-finding as though it were caught *flagrante delicto* in the commission of some moral wrong. But the very words used are big with potential deception. Who shall say whether any given nation deserves to be called a "civilized" nation? The line of demarcation may be as difficult to draw as it is in private life to draw the boundary between a gentleman and one who is not a gentleman, a wise man and a fool, a scholar and an ignoramus. The extremes in each class are easily recognized and classed. But the sinner may in a moment of inspiration rise to the heights of the saint: what label shall we in general terms affix to his character? George IV. was the "first gentleman of Europe;" shall we accept him as a type like Sidney and Bayard? Benedict Arnold lives embalmed in the contempt of a great nation because of the one act that sullied a brilliant life, but another great nation received him with open arms, allotted him an honorable livery, and treated or affected to treat him as a patriot and a hero! Whose standard was right, whose was wrong?

Probably the "civilized nations" will none of them accept Turkey as one of their guild; nay, they all treat her, by reason of this excommunication, as they will, simply because

they are not dealing with one another. It would, indeed, be a one-sided contract if Great Britain or France, confessedly civilized, should feel bound to treat the Turk as though he were a Christian, while he recognized no authority, and bound himself to no rules of good behavior. And yet, if there be a moral sanction in these rules, how can they be taken up or laid aside according to the station of the party whose rights are involved? But the difficulty extends much further. Granting that the definition does not prevent the abrogation or expulsion of Turkey, nor the arbitrary and violent seizure of African territory, who shall say when a nation is so civilized as to come clearly within the definition? Shall she herself have a voice in the matter? If her ports are about to be bombarded or her territory torn from her by violence, may she say, "Stop, I am civilized, and the rules do not permit you to treat me in this brutal manner." Or may the unquestionably civilized power justly assume the judgment seat, and retort, "No, you are not civilized, you have no *habeas corpus*, no trial by jury, no liberty of the press. You do not belong to our privileged brotherhood of states; *ergo*, you shall be taught reason at the cannon's mouth." It is much to be feared that unless the Balance of Power, a Big Brother, or some other *Deus ex machina* should appear on the stage, the bombardment would have to go on, the Rules being suspended.

Nor is this all. The Rules, it is said, are binding on the civilized nations who have agreed to be bound. But what becomes of the civilized nations that have not agreed, because they came into the world as Governments too late, or ripened into salutary civilization so recently that they have not had an opportunity to recognize the binding force of the Rules? This Republic, for instance, while generally recognized as one of the civilized nations, even if peradventure given to overfreedom of speech, dissents from some of the Rules—those on Privateering, for instance. What is her status under the Rules? How far do they apply to her? Rules of International Law, if they mean anything, are intended to promote the interests of the nations that recognize them, to the extent

of giving them a just equivalent for what they concede to one another. But the United States as a nation, by its extent, its resources, the nature of its government, its remoteness from European communities, its natural sympathies for weaker neighbors, must necessarily take a different view of many subjects from others in the civilized combination. Shall she be voiceless when right and justice according to her standpoint are violated under the generally accepted rules? Or may it not be fairly claimed that so important a factor in the society of nations shall have its influence and be recognized, even if old ideas must be modified, ignored, or set aside?

Much of the misconception on this subject arises, as is often the case, from a confusion in terms. Not only is there no International Law in the true sense of the expression, but the expression itself is misleading. The *Jus Gentium* is the *right* of nations, or as it is termed in the Continental Books *le droit des gens*. As individuals may be said to possess rights inherent and inalienable—at least our great Declaration so states as a proposition beyond dispute,—so it may be said that each nation has the right to preserve and defend its existence, to assert and maintain its independence. Certainly in theory this may not be gainsaid. From this *right* must of necessity arise and grow corresponding duties on the part of others. To what limit this right may be extended, how far it may be circumscribed, to what extent the “pursuit of happiness” may justify expansion, how far the right of self-defense may interdict its indulgence, these are the problems involved. No great nation has ever hesitated to pursue her own advancement where it could be done without danger and without shocking the public opinion of civilized mankind. But great and powerful nations have learned by experience that self-denial might be more profitable than the application of brute force, provided a like restraint was observed by their neighbors. International Law, if there be any, is the law of enlightened self-interest, guided by prudence, and by the consciousness that peace has marked advantages to recommend its preservation. It is a curb upon rashness, a moral adviser against brutal measures, a reminder that the fortunes of war

are uncertain. The great purpose of and incentive to a system of intercourse based upon mutual respect for public rights is the approximation among nations to the methods generally accepted among men in their individual capacity. That is to say, the Governments of to-day are willing, as a general proposition, to recognize the existence in times of peace, of ethical rules which it is to the general advantage that all should obey. And as no ethical system devised by the wit of man has ever approached in beauty and perfection the Christian religion, the principles of the faith have been accepted, with limitations of place and circumstance, as the ground work of international rights and duties.

Evidently it is no easy task to define such a system or science as this. It is easier to state what it is not than what it is. It certainly is *not* a system of law, if any known definition of law has preserved its value. No rule of action may properly be termed a law, which has no sanction. A rule to be efficacious must be imposed by a superior upon an inferior: there must be the fear of punishment attached to its violation or the hope of reward must encourage obedience to its mandates. When we speak of the Divine Law, the Federal Law, the State Law, we use words which present an intelligible idea. Even if we speak of the Law of Nature we are within the truth, for nature punishes the transgression of her edicts with unflinching severity. But International Law is different from all these, and can no more restrain the anger of an aroused people, than King Canute on his throne could drive back the waves that took no heed of his royal commands.

If, then, I have ventured to criticize the language of the eminent Justice in his attempt to formulate his own idea of International Law, it is not from any doubt that it was as accurate as the nature of the case allowed, but simply because it is not, or at least has not yet been possible to define International Law on the theory that it is a law at all.

Under these circumstances it should be obvious that I cannot undertake with any confidence the task which so many have attempted without absolute success. I would venture, however, to describe my own imperfect conception of what is

termed International Law, by saying that it is the result of an implicit agreement among civilized nations to abide by those practices which have proved most conducive to the promotion of profitable intercourse in peace, and to the mitigation of suffering and hardship in war. I hope that I am not overrating my own powers of critical analysis when I add to this the confident assurance that I could detect many flaws in this rather clumsy definition had it been presented by any other person than myself. Possibly even this circumstance may not be absolutely prohibitory, when time and reflection have suggested needed improvements.

How far the Christian religion has contributed to the formation of the *Jus or Right of Nations* may not be easy to determine, but it does nevertheless seem clear that no such system could have existed when Rome was mistress of the world, or could exist to-day but for the lofty principles inculcated by that form of religious belief. It is an offshoot of the teaching that men are brothers even when they live on the opposite banks of a river, even when they speak a different language, even when they present wide divergences of morals, tastes, habits and customs. If men acting in their political capacity were governed by the same rules and principles as they are in private lives, Christian ethics might be a much more potent factor in the adjustment of international relations. But unfortunately America is not the only country where public men claim the right to own two consciences, one for the guidance of their public, another for the direction of their private life. Great ministers and kings have deemed it lawful to deceive, cheat, despoil and destroy their neighbors with such happy results that to say, "Honesty is the best policy" in the public conduct of nations would betray ignorance or suggest sarcasm. Probably no great power in Europe may boast that its record is entirely free from blemish. After the treaty of Berlin a few years ago, the French Ambassador returned home with the boast that France had kept her hands clean, which was certainly true if cleanliness and emptiness had been interconvertible terms. But it is no imputation upon her citizens to add that they might have preferred some substantial evidence of

practical diplomacy, an island in the Mediterranean for instance, even if the perfect purity of her motives and conduct had been thereby made less apparent. We ourselves boast, justly I think, that our conduct of public affairs has been on the whole conspicuously free from reproach. Yet this is what one of our reliable historians, an American of Americans, has to say: "In the end far more than one-half the territory of the United States was the spoil of the Spanish Empire, rarely acquired with perfect propriety. To sum up the story in a single word: Spain had immense influence over the United States, but it was the influence of the whale over its captors, the charge of a huge, helpless and profitable nation." Adams, V. 1, p. 343.

It may be interesting here to note that the attempt was made during the present century to subject international relations to the exalted precepts of the Gospel. Alexander the Emperor of Russia, after Waterloo and the resulting restoration of Louis XVIII., seems to have been deeply affected by his and his allies' triumph over the giant whom they had overthrown. He determined that, so far as lay in his power, he would see to it that the world should be governed by Christian principles, and carrying his theories into practice he proceeded to convert the King of Prussia and the Emperor of Austria to his own way of thinking. Poland was not represented in these royal and imperial conclaves, except by those who had themselves partitioned her. A league was formed by which three mighty sovereigns agreed to consider themselves as members of one great Christian family; their real and sole Sovereign was Almighty God, whose delegates they declared themselves to be. Thenceforth, they would tend their respective flocks according to the word of God. Naturally, there could be but one appropriate title applied to this association, and it was accordingly known as the Holy Alliance. England refused to enter into this impressive and picturesque concert of Potentates, her representative (Lord Castlereagh) having written that the Emperor Alexander was out of his mind, but others gave their assent to the initiation of Christian politics, and the Law of Charity was thenceforth to rule the world.

But the effervescence which prompted this fine innovation

was soon over. Napoleon was chained to his weather-beaten rock, and it was not likely that he would ever be released except by Death, a contingency to which none of the parties to the new dispensation objected, as he would then no longer be dangerous. Security of tenure is a conservative adviser. When the recently shaken thrones had been repaired, and their owners became firmly seated, it was evident that the pestilence of liberal ideas must not be permitted to spread. The Divine Power of Kings and Emperors was so valuable to the world that it should not suffer jeopardy at the hands of turbulent people who wanted the liberty to speak, to write, to think, to come and to go at their own will. Reaction must be put down by the royal and united brethren, and it would have been put down and stifled even in America, but for the timely declaration made, in apt terms, by President Monroe to Congress in 1823. In Europe the Alliance succeeded in its efforts to suppress the clamor of the people, and for some years to come the great Monarchs could contemplate with satisfaction the fruits of their common efforts. The Holy Alliance became, in Mr. MacMaster's language, a mutual association to show that Diplomacy was less selfish or Kings less ambitious, or International Law more certain or more efficient than before the Articles had been signed.

Their failure to improve the moral character of international relations should not be deemed of any significance except to show that spasmodic attempts, born of temporary excitement and peculiar surroundings, accomplish but little, in the long run, for the improvement of mankind. Self-interest, self-preservation, and a prudent apprehension of disastrous changes are not the only factors in the solution of weighty problems. They may, in a measure, be productive of good results where wholesome fear acts in the direction of self-restraint. It is manifest that if all the crowned heads of Europe had, at that time, agreed to administer the weighty matters entrusted to their hands on general principles of enlightened Christian ethics, and had respected the obligation of their mutual bond, the world would have been better and wiser and happier. And so would society be better and happier if all the members

joined together in a solemn league to obey the Decalogue and live up to the sublime heights of the Sermon on the Mount. But the practical difficulty would probably arise out of the failure of men to overcome the laws of nature which prompt them to violate the moral laws, notwithstanding their promises of amendment. Fortunately, Courts and Officers of the Law are present to supplement the imperfect execution of excellent intentions where individuals are concerned, but this important element is lacking where Royal heads find mischief for Royal hands to do. So the Emperors and Kings of the Holy Alliance might adopt noble maxims of conduct, with excellent intentions, and fail to carry them out with equally excellent intentions; they were the Lords of the occasion, the Masters of the situation, and, worse than all, the sole interpreters of the Rules which they professed to follow. It is hardly necessary to say that conscientious men have committed atrocious acts with unimpeachable motives, and have found in the sublime precepts of religious faith apologies for measures which are written in crimson on the pages of History. It is not enough then to find the Masters of the World setting out to reform international relations according to the most approved rules. Certain plants, and those the most enduring, are of slow growth. They thrive on the summer rains and the summer heat, but they grow strong and enduring only when they are able to stand the test of storms and cold. No law, no system of laws, no scheme of universal political ethics, may live unless it be ratified by experiment and approved by lapse of time. The confidence of the World is not easily won. The People are not easily charmed by sweet promises and dulcet protestations. They realize that the popular view is not always the kingly or imperial view, and if they never knew it until the Holy Alliance undertook to consecrate the Divine authority of Rulers, and to put down by force the aspirations of the masses, they then learned that different points of view often lead to opposite results. They may well prefer slower international processes to sentimental protocols, and ask, with Anglo-Saxon directness, whether the innovations are likely to pay. Not a picturesque view indeed, but

one that saves trouble in the end by forestalling rash experiments.

It may in truth be said that International Law has grown, and is likely to develop much as the Constitution of Great Britain and the Constitution of the United States. These differ, I need hardly state, in the important particular that the one is written, and the other exists only by tradition. But the difference is less in substance than in name, for the stubborn conservatism of the English race and their strong love for precedent make that stable and enduring, which would be evanescent and temporary with a differently constituted people. Our Constitution, on the other hand, left the framers' hands, in outward form, a skeleton, which it became the duty, most admirably discharged, of the Supreme Court, to clothe with flesh, to inspire with life, and to endow with motion. Its written formulation is but a brief declaration of principles to which Legislation must conform, but which, with its marvellous terseness and pliability remains in unfettered activity ready to expand as the necessities of a growing nation demand. In this do these Constitutions differ from the hand-made products of Continental Europe. The written schemes of Sicily, for instance, were ingenious in the extreme, and were written in a few hours; they lacked but one thing, they would not work in practice. The different parts of the beautiful mosaic fitted each other with artistic exactness, but alas! like a toy boat on a real ocean, they went to pieces as soon as they were tried for the business of a great people's political life. So must it be with International Law. It is in no man's—no nation's—power, to make it or add to it without the acceptance of general civilized opinion, and it cannot be so accepted until time and experience have demonstrated its fitness. That additions must, from time to time, be made to any international device cannot be disputed without condemning the actual system to death by anæmia. If the world moves, any method or scheme of adjusting the relations of its component parts cannot remain motionless, especially when young and vigorous nations are added to the family, and by their restless activity disturb the old conditions of paralyzed

equilibrium. Our own country demands recognition by her commanding position as Queen of the Western World. She does not require the exchange of courteous protocols to assure her of that recognition. It is said of General Bonaparte that a Treaty of Peace was presented to him after one of his dazzling Italian campaigns, in which proposed Treaty was an express recognition of the existence of the French Republic. He struck out these words, because, as he said, the French Republic, like the sun, needed no such acknowledgment; she was like the sun, visible to all mankind. The Republic of which we are citizens does not need to be told what she is, nor what her rank, nor how far her fiat is the law of two continents. She cannot be ignored, nor her legitimate influence minimized. It is not too much to say that no revision of ancient rules devised by Grotius and Puffendorff and Vattel will be complete without amendments and additions from her. To ask nothing that is not right, to submit to nothing that is wrong, was always a rule of our Government, and is to-day. We shall be wise and remain strong if we adhere to it. In the catechisms of Napoleon's day, the children were required to give special thanks, because the Almighty in his mercy had vouchsafed so excellent a Ruler to France. Let us hope that, as years roll on, the World shall become so much happier and better because of our being part of it, that other nations may, with grateful hearts, bless the Providence which inspired the Fathers with wisdom to lay the corner-stone so well. It only remains for the children to love the work thus begun with earnestness enough to preserve and protect it against enemies from without, and the more dangerous foes within. Then shall our mission be in the way of glorious accomplishment.

International Law, if it is to keep step with the progress of mankind must take into account the fact that the balance of power has passed from the Throne to the People. Whether for good or for evil, the Royal or Imperial Crown with scarce an exception, is held by gift. We see, at times, glimpses of mediæval reverence for the great office of Ruler over a nation, and the Ruler himself sometimes astonishes or amuses

the world by mediæval claims to a Heaven-bestowed dignity. But the Gracious Queen, who has so worthily and so long held the sceptre of Great Britain, claims no title to her dignities and her palaces, outside the laws of the land. No one fact in modern history shows more strikingly the changes wrought by time than the fact that the successor of Queen Elizabeth is Queen by virtue of an Act of Parliament, which may be unmade as it was made, while across the channel the palaces of Louis XIV. are occupied by a reputable gentleman, recently engaged in business, who, for a brief term of seven years, executes the bidding of a plebeian Legislature. When we recall the fashion in which the Virgin Queen and le Grand Monarque treated the law makers of their day, we need no other reminder of the radical changes that have marked the transfer of power from the King to the People.

Obviously such vital differences in political conditions the world over, must have their influence on International Law. The moulding of the system has passed into other and possibly ruder hands. The niceties of Diplomacy have assumed another shape, or more properly have disappeared with the elegant forms that accompanied and made part of them. Directness of speech, open explanation, frank statement of what is denied or objected to, are becoming part of the International Law or at least of International Procedure. We, of America, have done our international business without the intervention of professional go-betweens, and we have not thus far had cause to complain that we had no experienced Diplomats to embarrass our relations with foreign powers by their ponderous and dilatory methods. The secrecy of the old style cannot exist when the Press is free. We cannot well imagine the King of one nation subsidizing the King of another for any length of time without a publication of the fact with its necessary consequence of putting an end to the relation of Master and Servant. Yet Charles II. was the recipient of a salary in French gold, which he spent with royal profusion in every way, except in the way of benefitting his people. This fashion of regulating foreign relations and of settling international differences may be said to have disappeared.

That the gross form of bribery here alluded to was exceptional, may be granted, but it cannot be denied that the personal relations of sovereigns had much to do with the intercourse between nations, and to that extent affected International Law. The situation of a whole people might be changed and often was changed by a marriage. The Kingdom of France really became such by happy alliances adding Duchies of vast extent to the Central Power, with as little ceremony as a neighbor's farm is annexed with its chattels to the lands of an owner who desires territorial expansion. France virtually annexed Spain when the King's son Philip ascended the Spanish throne. But a war of gigantic destruction followed the mere suggestion made in our day, that a German Prince might take the place which Philip once filled. It is true that the suggestion was afterwards withdrawn, and the wrong of initiating a war without necessity was imputed to France. Yet it cannot fairly be doubted that if the attempt had been made to place this German Prince at the head of the Spanish nation, the principles of International Law, as generally accepted and understood, would have been violated. For, if there be one principle which stands out to give the appearance of substance to this vague and shadowy law, it is that the Equilibrium of Power must not be disturbed. This may be said to be the *fons et origo* of the whole plan. The religious observance of the rule is indispensable. *Noli tangere* is the golden maxim, which permeates and gives life to it and general acceptance. A maxim, too, that is not confined to the narrow limits of an actual injury, a direct assault, but with the elastic force of every great principle insists upon investigating remote and apparently unimportant facts. And it is, indeed, vital, for its acknowledgment alone preserves the peace of the world. How long, think you, would Holland retain her independence but for this? She is filled, it is true, with a brave and patriotic people, but the German Uhlan would water his horses in the picturesque canals of the Hague, and the Watch on the Rhine would be sung in that ancient city's cafés long before the dykes were opened to drown the irresistible foe; how long would Belgium retain her autonomy

and flourish in art and wealth and a prosperity all her own, if the tempting prey were opened to the neighbors who, in the past, made her a part of the French nation. But to touch Holland, or Belgium, or Switzerland is to disturb the equilibrium, and an attack upon either would be resented as swiftly in London, as though a French or German fleet were threatening the coast of England.

All which amounts to no more than saying that self-protection and self-preservation constitute the corner-stone of modern International Law. This instinct is as strong in communities as in individuals, and will, when aroused by real or imaginary perils, sweep away forms and law as worthless encumbrances if they interfere with their first duty and most valuable right, the duty to resist aggression and the right to live.

Utility is the chief ligament that binds together into something like systematic arrangement the provisions of International Law. In the complicated European affairs of to-day, with nations closely approximating each other in financial resources and, therefore, in military power, some concession by each to the other must be made in the form of self-denial. To live in the family of civilized nations, no power shall appropriate the territory of a weaker neighbor without the permission of the other parties in interest. This permission may be obtained by a successful war as was done until and including Napoleon's time. But he closed the era of the great Conquerors who dispensed, in hurry of an agitated career, with the usual forms of international courtesy. It is not likely that until the present system is radically changed, a victorious Emperor or King will tear down, build, remodel, patch up, or create thrones as the requirements of his policy or the importunities of his relatives might require. "The House of Braganza has ceased to exist," was all the notice that he deemed it necessary to serve on the parties interested, or on the world in general, when it suited him to abolish that ancient family; nor, is it probable that any other Military Genius will carry on war at the cost of others, and reduce home expenses by levying contributions far in excess of the

actual and necessary disbursements to which he had been put. International Law has, at least, benefitted the world in this, that the moral sentiment of mankind finds an expression in the practices which civilized nations have sought to establish among themselves for their mutual guidance and mutual interest.

It is now chiefly by treaty that accessions of territory are had. The advantages of such treaties as those which followed the downfall of Napoleon are manifest. They consecrated a distribution which silenced opposition by its generous equity. That generosity was exercised at the expense of others than the contracting parties ; but the equilibrium that had been so unduly disturbed must be restored, and it was done probably with as little harm to the smaller factors in the problem as was consistent with its solution.

Returning for a moment to the beginnings of International Law, we find that Self-Preservation and Utility are at its source. Indeed they constitute its *raison d'être*. For while we may say that it is the preserver of peace, and the refuge of the weak, the same story is told under a changed name. The strength of the weak lies in the jealousies of the strong, and the preservation of Peace in the greater benefits that nations can reap from the quiet pursuits of commerce and agriculture. A proper apprehension of the advantages which nations derive from a husbanding of their resources, and an economy of men and treasure, does more for the happiness of the world than the most voluminous treatise on the Rights of War and Peace. An intelligent book on Political Economy is really a demonstration of War's futility. The value of a human life may be computed in money, and shake the purpose of the Potentate who meditates a war. It is not only of the Royal head of the animal kingdom that we may say, "A living lion is worth two dead." It is true of human beings as well. The would-be Conqueror may not be deterred by humanitarian pleas, nor hesitate because of brave men's blood and women's tears, both shed for his caprice. And yet he may hesitate at the cost of an unarmed man if he computes the value of the man as well as the cost of the accoutrement.

Nor can it be fairly gainsaid that with our progressive civilization, which means the more general diffusion of education, a broader, finer, stronger moral sense has grown up among the nations. It shows itself in many ways, and breathes its purifying spirit into the dry tomes of the International Law writers. War has lost some of its horrors because humanity protects the wounded prisoner and cares for him as though he were a forgiven foe or a recovered brother. Human slavery is dying out, and the traffic has become almost a record of the past. Unprovoked attack upon a weaker enemy is less frequent than of old, not only because of the danger of arousing defenders for the weak, but because of a decent regard for the opinions of mankind. One short century has wrought a change in these respects that almost staggers belief. The shocking absence of humanity that once characterized the conduct of refined nations seems inconsistent with anything but barbarian depravity. And we may, perhaps, venture the boast that at no time has the intercourse between members of the human family been so near the Christian ideal, far removed though it still be from its moral beauty, as it has been since the People have been the predominant element in the conduct of the world's business. The heart of the People beats with more generous pulsations than that of the artificial society which acquired and so long kept control of human actions. Torture was never the People's instrument of justice, although it was the Kingly implement: cruel and unusual punishments disappeared from the statute books as soon as the People's strong hand wrote the laws. War became humanized, so far as its inherent brutality permits, as soon as the People became the Masters. For it was of old the People who suffered the torture, fought the battles, paid the taxes, and bore the burden of the day and the heat. Small wonder if they have learned that they could improve upon the old devices when the class that made the harsh laws and imposed the heavy burdens never felt the edge of the law nor the weight of the burden.

With the People's reign new ideas have come to the front, and old ideas have gone to the rear. True, Bipartite, Tripartite, and Quadripartite treaties and alliances may still be made,

and the People may not be told to what they have been committed, but even in those countries where such contracts are made, it is not quite certain that when the decisive moment comes, the masses may be moved with sheep-like docility. Then, too, a new and disturbing element has entered the fold, a young, restless, growing nation, impatient of forms, a lover of action, a partisan of Justice. If left alone one People will not hate another People. The resentments of Monarchs are not always echoed in the hearts of their subjects. Our United States has given a practical example of what may be done for Peace by a nation that is able to be strong in war, for we have an International Law binding forty-five States together under a written treaty. Our differences are settled by a Tribunal of Arbitration that deals with the Communities as freely as it would deal with the individuals that compose it. An experiment was once made outside the jurisdiction of this Tribunal only a generation ago, and a great lesson learned.

That there may be grave peril in a situation which gives free scope to the generous impulses of a strong nation cannot reasonably be denied. Impulse, even when directed to a noble purpose, is often the enemy of Right Reason, and defeats its ends. It is in the nature of things that a story of wrong, persistent and unredressed, should rouse our people to wrath and tempt them to chivalrous, even if imprudent action. A great Republic, unembarrassed by the barnacle growth of ages, lightly equipped, because free from oppressive debt, earnest for liberty and hating oppression, is prone to generous folly that makes the Old World stand aghast. The cries of our neighbors are quickly caught up by ready ears. Differences of race are soon forgotten when our sympathies are plausibly invoked. We are, perhaps, too ready to love our neighbor as ourselves. A noble maxim in private life and one which no doubt should find an honorable place in the International Horn-Book. For International Law is based on, made up of, and permeated with Moral Law. It is nothing, if not moral.

The eminent Chief Justice of England says that "The ultimate aim in the actions of men and of communities ought to conform to the divine precept—'Do unto others as you

would that others should do unto you.' " An exalted, but, perhaps, not wholly safe guide in the intricate labyrinth of international relations. While such a precept if followed by individuals would raise society to a plane that it has never yet attained; while it may be followed by all who understand it to be the essence of the precept of Charity, the application of the Golden Rule in the larger matters of the world might be destructive of all pretence of international law. Unrestrained emotion, however generous, might and would be indulged in at the expense of nearly every rule that Jurists have taught from Grotius and Puffendorff to Story and Wheaton. Law, every law, means restraint and involves self-denial. When these States were Colonies in rebellion, they longed for, sought and obtained foreign intervention. Does it follow that the mature nation shall do to others what it then desired others to do for it? The point of view of contending nations is naturally different. If to-day a foreign Power seeks by force to retain in subjection its reluctant Colonies how shall the Golden Rule be applied? Which of the contestants shall receive the benefit of its application in the form, not only of sympathy but of moral and physical support? We have been at one time the rebellious Colonies, at another the power that undertook to reduce its rebels to submission. In the one case the Golden Rule meant, "Help those who struggle for freedom;" in another, "Hands off!" Non-intervention in the affairs of other communities is one of the few principles that are generally recognized as essential to the peace of nations, and yet it is hard to keep the blood of a free and magnanimous people from tingling and rushing to fever heat when the cries of a despairing neighbor rise in protest against oppression. Yet our Washington, with prophetic vision of the dangers lying in wait for his countrymen, warned them against listening to the voice of natural and brotherly sympathy. What, then, becomes of the Golden Rule, if it is circumscribed by expediency, fettered by law, and condemned in practice by "those rules to which nations have agreed to conform in their conduct toward one another?"

This apparently pessimistic view of the applicability of

moral precepts to the regulation of international affairs only serves to prove that the element of Law enters but inadequately into the system that we are considering. Where the municipal law is concerned no such confusion and difficulty arise, for the statutes interfere to prevent the over-zealous moralist from indulging, to the detriment of others, in his desire to promote the welfare of his neighbors. He may give his fortune and his time or his life to the improvement of his brethren, but even Philanthropy has its legal limitations. The best, the most exalted motives will not give immunity to the violation of a statute. The wings of Charity are often clipped by the shears of cold-blooded legislation. Wrongs often go unredressed because a Christian Quixote may not do to his noisy or peace disturbing neighbor what his own construction of the Golden Rule would suggest as most expedient.

It may appear from what precedes that the sanctions of International Law are at least imperfect and insufficient, if they exist at all. It may be accepted as a fact, not encouraging perhaps to the student, that the system is only an approach to a system, the Law only an approximation to a Law, the Rules no more than abstract precepts which may be violated with impunity, because there is no Tribunal vested with the power to restrain or to punish the violator. But imperfect as the device may be, it deserves careful consideration. Its aim is high and its purpose beneficent. It is of some avail *parcere subjectis*, though it has never yet been efficient *debellare superbos*. It is in effect an attempt of Christian civilization to propose humane rules for the international regulation of the affairs of the several nations. It has not yet taught forbearance to the mighty, nor given assurance of Justice to the weak, but it has striven to do both, and in some measure it has succeeded. It has not abrogated war, but has taught the value of charity, even when the laws were silent. It has not abolished human slavery, but it has brought nations to a common understanding that the traffic in human beings should be in the common interest of their self-respect, crippled if not destroyed. It has founded no Tribunal, but has developed a monitor,—Public

Opinion,—which may remonstrate and denounce in a voice that goes around the world. And finally, when clouds of dissension arise upon the horizon, it teaches, by its very misnomer, that there is a class of men who may be trusted to solve weighty problems more safely and less expensively than those who rely upon force to persuade, and gunpowder to convince. The Lawyer,—or as he is finely called when his client is a nation,—the Jurist, at the opportune moment, steps upon the scene, and the halting march of Progress is resumed, the wheels of commerce continue to revolve, Protocols take the place of Declarations, Pleadings of Bulletins, and legal opinions of Proclamations. No ghastly list of dead and wounded sickens the homes of the contestants. When the fight is over, no healing processes of Time and Taxation are needed to repair the waste, for Reason has had the last word and has reached a result quite as certain to be just, as though the debate had been fought out at Waterloo, Gettysburg or Sedan. If this be one of the fruits of this so-called Science, it is indeed a blessed Science that deserves to live forever.

Frederic R. Coulert.

June 7, 1897.

SOME ASPECTS OF THE LAW OF LIBEL, APPLICABLE TO NEWSDEALERS.

The administration of justice is deemed by the laity a very simple matter. They by no means conceive the intricacy of the affairs which courts are called on to unravel nor the strong equities which often clamor for each of the contending parties. Said a German farmer to the writer: "The Judges of the Supreme Court have an easy time. They just sit there and decide, and I suppose, too, that everything goes by favor." The speaker was a prominent and well-to-do man in his town, often its chairman and once a member of the State Legislature. His sentiment, I take it, is the sentiment of very many, perhaps most, rural and unsophisticated persons.

Yet, after all, Lord Chief Justice Russell was right in saying that: "Justice and its administration are amongst the prime needs and business of life." Exact justice is often impossible, yet the law seeks and, in the main we may believe, the courts attain far better results than would be reached if their functions were confided to those humane and upright, but unlearned persons, who very sharply attack the bench and more than intimate that they themselves could do better.

When King James the First sought to take to himself the decision of cases pending in his Majesty's Courts he soon felt the difficulty and expressed it with his usual clumsy misapprehension. "I could get along very well," said the royal pedant, "hearing one side only, but when both sides have been heard, by my soul, I know not which is right."

Libel is by no means a rare action in this country, as a glance at the American Digest will show. Thus, in 1893, we find there digested 187 points in the law of libel, 23 of them in criminal cases. In 1894, 181 points, 13 of them in criminal cases. In 1895, 193 points, 21 in criminal cases. In 1896, 236 points, 20 in criminal cases.

Now the rules of liability to which persons are held in libel are often of the less simple and palpable character. It

is always hard to believe that persons morally innocent can be legally condemned. That those who committed no crime and intended no crime and have been personally knowing of no crime can yet be successfully charged with responsibility for it.

The liability of a newsdealer from whose shop a libelous publication is sold without his procurement or knowledge sometimes presents a case where the scales seem closely balanced. The libel is quite as injurious to the wronged person as any other. It seems he ought not to be remediless. Yet the newsdealer himself has wittingly offended in no way, and is, perhaps, guilty of no moral crime. Though actions for libel are not uncommon with us, English courts and juries seem to so greatly favor large recoveries in cases of this sort, often upon comparatively slight showing, that this form of action seems particularly prevalent in the British Isles. We must look, therefore, to English Reports for fuller and more varied consideration of the various liabilities arising under this head. There we find this liability of the newsdealer much considered.

Thus, in *Dominus Rex v. Elizabeth Nutt*, Fitzgibbon, 47. (same case, 1 Barnardiston, K. B. 306,) information for publishing a treasonable libel was tried at the Guildhall before Raymond, Chief Justice, where, upon the evidence it appeared that the defendant kept a pamphlet shop and that this libel was sold in the same shop by the defendant's servant for the defendant's use and account, in her absence and that she did not know the contents of it, nor of its coming in or going out: *et per* Raymond, Chief Justice: "Notwithstanding, the defendant is guilty of publishing this libel, the shop being kept under her authority and direction; and 'twould be of very dangerous consequence that the law were otherwise; and it has been so ruled in a great many instances." Mr. Kettleby, in Barnardiston's Report, is reported as urging, "indeed, the act of a servant may charge a mistress in a civil suit, yet it was by no means reasonable it should charge her in a criminal prosecution;" and in Fitzgibbon, "If a post-boy should carry a libel sealed up, into the country, must he be punished

for it?" To which Raymond, Chief Justice, answered, "That there the question would be, whether such carrying by a post-boy would be deemed in law a publication; and in all these cases the mischief is equal, though the parties' intention do not concur." In Banardiston's Report the Chief Justice is reported as answering that the case of the post-boy was not at present in question. "But he observed that if a servant carries a libel for his master, he certainly is answerable for what he does, though he cannot so much as write or read." The jury being unwilling to agree upon a verdict, the Attorney-General consented a juror should be withdrawn, which was accordingly done.

In *King v. Dodd*, 2 Sessions Cases, 33, (Hilary, 10 Geo. K. B.,) an information was moved for against the defendant for selling and publishing a libel against one Chambers, and it was insisted on for the defendant that she was sick and that her servant took the libel into her shop without her knowledge. But, by the Court: "this is no excuse, for a master shall answer for his servant, and the law presumes him to be acquainted with what his servant does. Mr. Justice Fortescue said that it had been ruled that the finding of a libel on a bookseller's shelf was a publication of it by the bookseller. And Lord Chief Justice Raymond said that it hath been held that where a master liveth out of town, and his trade is carried on by his servant, the master shall be chargeable with the servant's publishing a libel in his absence."

In 1770, was decided the famous case of *Rex v. Almon*, 5 Burrows, 2686. In this case the defendant had been convicted of publishing a libel, (Junius' Letters,) in a copy of a magazine called the "London Museum," which was bought at his shop and even professed to be "printed for him." His counsel moved, on Tuesday, the 19th of June, 1770, for a new trial, upon the foot of the evidence being insufficient to prove any criminal intention in Mr. Almon, or even the least knowledge of these magazines being sold at his shop. And they had affidavits to prove that it was a frequent practice in the trade for one publisher to put another publisher's name to a pamphlet, and that this was the present case, and this

was without defendant's knowledge or approbation. That, as soon as he saw his name put to the publication in question, he sent a note expressing his disapprobation to the real publisher. That he himself had no concern whatever in the London Museum." That he was not at home when they were sent to his shop. That the whole number sent to his shop was three hundred. That about sixty-seven of them had been sold there by a boy in his shop, but without Mr. Almon's own knowledge, privity, or approbation. That as soon as he discovered it he stopped the sale, ordered the remainder to be carried up into his garret, and took the first opportunity to return them to Mr. Miller. That it was not proved that the person who sold them was Mr. Almon's servant or employed by him, or that Mr. Almon was at all privy to the sale.

Sergeant Glynn stoutly argued that the proof against Mr. Almon appeared therefore to be defective: there was nothing to constitute criminality or induce punishment. He further offered the affidavit of one of the jury that he, the juror, understood Lord Mansfield to say that bare proof of the sale in Mr. Almon's shop without any proof of privity, knowledge, etc., was conclusive evidence, and that if he had understood the jury were at liberty to exercise their own judgment, he would have acquitted the defendant. The Court very peremptorily refused to allow the affidavit to be read, but Lord Mansfield said he had been properly understood. That the substance of what he had said was "that in point of law the buying of the pamphlet in the public open shop of a known, professed, bookseller and publisher of pamphlets, of a person acting in the shop, *prima facie*, is evidence of a publication by the master himself; but that it is liable to be contradicted, where the fact will bear it, by contrary evidence tending to exculpate the master and to show that he was not privy nor assenting to it nor encouraging it. That this being *prima facie* evidence of a publication by the master himself, it stands good till answered by him, and if not answered at all it thereby becomes conclusive so far as to be sufficient to convict him. In practice, in experience, in history, in the memory of all persons living, this is, I believe, the first time it was ever

doubted that this is good evidence against a bookseller or publisher of pamphlets. The constant practice is to read the libel as soon as ever it has been proved to be bought at the defendant's shop. This practice shows that it is considered already proved upon the defendant; for it could not be read against him before it had been proved upon him." He declared this as much established as that the eldest son is heir to his father, and all the judges warmly concurred.

The King v. Woodfall, Lofts, 776, was the yet more celebrated case in which the principal publishers of Junius Letters were prosecuted in 1774 for a libel on the revolution and on the persons of King William and Queen Mary. Counsel for defendant said, in closing, "What is there to fix it on the defendant, who was in prison and ignorant of the publication?" Lord Mansfield, "Whenever a man publishes he publishes at his peril, for there is no entering into the secret thoughts of a man's heart. If he had been in close custody so that his servant could have no access there, I should have thought it a difference very proper to have been left to you; but it is just the same as in his own house; for his servants and all the world had access; and the boy brought the paper to him every day. Otherwise I should have thought the particular circumstances very proper to have taken it out of the general case; but here it is just as in the case of last Saturday. He either did or did not know it; if he did then he is answerable upon that case, if not he ought to have known it." The defendants were both found guilty and each was fined 300 marks.

Passing down from these classical days of the law, when the silver-tongued Murray was devoting his great talents to nobly and reasonably expanding the law merchant, but to ignobly and unreasonably contracting the ideas of human liberty, or, at least, to combating their development in many other lines, we find an interesting civil case in which a great judge, Lord Esher, Master of the Rolls, happily still living at a venerable age and administering his historic office, illuminates the subject. The case is *Emmens v. Pottle*, 16 L. R. Q. B. Div. 354 (1885-6). This was an action for 5000 pounds damages against defendants, who were news vendors, for publishing a

libel against plaintiff by selling a copy of the newspaper known as "Money," containing the defamatory matter complained of. Defendants set up that they were news vendors, carrying on a large business in London, and as such sold the copy of the periodical in the ordinary course of business, without any knowledge of its contents. The jury found that neither of the defendants knew when they sold the newspaper that it contained any libel, that they were not negligent in so failing to know, and that the newspaper was not of a character likely to contain libelous matter. The plaintiff in person argued his case, and on his saying, "If a man deals in dangerous articles he ought to be liable for an injury which is caused by them," he was interrupted by a question from Bowen, L. J., "Are you not bound to show that a newspaper is in its nature a dangerous thing?" In the principal opinion, Lord Escher, M. R., observed, "I agree that the defendants are *prima facie* liable. They have handed to other people a newspaper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to shew some circumstances which absolve them from liability, not by way of privilege, but facts which shew that they did not publish the libel. We must consider what the position of the defendants was. The proprietor of a newspaper who publishes the newspaper by his servants, is the publisher of it, and he is liable for the acts of his servants. The printer of the paper prints it by his servants and therefore he is liable for a libel contained in it. But the defendants did not compose the libel on the plaintiff, they did not write or print it, they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel. If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel and would have been liable for so doing. That, I think, cannot be doubted. But here upon the findings of the jury we must take it that the defendant did not know that the paper contained a libel. I am not prepared to say that it would be sufficient for them to shew that they did not know of the particular libel; but the findings of the jury make it clear that

the defendants did not publish the libel. Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and, still more, that they ought not to have known this, which must mean, that they ought not to have known it, having used reasonable care—the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. If they were liable the result would be that every common carrier who carries a newspaper which contains a libel would be liable for it, even if the paper was one of which every man in England would say that it was not likely to contain a libel. To my mind the mere statement of such a result shews that the proposition from which it flows is unreasonable and unjust. The question does not depend on any statute but on the common law, and in my opinion, any proposition, the result of which would be to shew that the common law of England is wholly unreasonable and unjust, cannot be part of the common law of England." Bowen, L. J., said further. "The jury have found as a fact that the defendants were innocent carriers of that which they did not know contained libelous matter and which they had no reason to suppose was likely to contain libelous matter. A newspaper is not like a fire; a man can carry it about without being bound to suppose that it is likely to do any injury. It seems to me that the defendants are no more liable than any other innocent carrier of an article which he has no reason to suppose likely to be dangerous. But I by no means intend to say that the vender of a newspaper will not be responsible for a libel contained in it if he knows or ought to know that the paper is one which is likely to contain a libel." Plaintiff's appeal dismissed.

In *Regina v. Judd*, 37 Weekly R. 143, (1888), the High Court held that where the "St. Stephen's Review" was printed by a limited corporation for the proprietors of the Review and the latter published it, under the rule of *Emmens v. Pottle* (*supra*) the directors of the printing company who knew nothing of the contents of the Review were liable neither criminally nor civilly.

In line with the suggestion of the last cases it has been held, limiting some earlier dicta, that if a porter in course of business delivers parcels containing libelous hand-bills he is not liable for libel, if shown to be ignorant of the contents of the parcel, for he is but doing his duty in the ordinary way: *Day v. Bream*, 2 Moody & Rob. 54.

The case of *Street v. Johnson*, 80 Wis. 455, decided in 1891, briefly reviews the earlier cases in deciding on the liability of a defendant sued for a libel upon the members of the W. C. T. U., contained in "The Sunday Sun," sold by him at his news stand. The learned Chief Justice, speaking for the court, says: "The authorities are to the effect that the mere seller of newspapers is not liable for selling and delivering a newspaper containing a libel upon the plaintiff if he can prove upon the trial, to the satisfaction of the jury, that he did not know that the paper contained a libel, that his ignorance was not due to any negligence on his part, and that he did not know and had no ground for supposing that the paper was likely to contain libelous matter." Citing various English and American cases, and continuing, "But it seems to be equally well settled that such sale and delivery of a newspaper containing a libel is, *prima facie*, the publication of such libel, and hence makes such vendor, *prima facie*, liable therefor." As it is summed up by Mr. Townsend in his excellent work on Slander and Libel (4th edition), section 124, "The proprietor of a bookstore or newspaper store is responsible for the contents of every book and paper sold in his store, unless he can prove that he did not know and had no reason to suppose that the book or paper contained any defamatory matter."

Of course, in general, the doctrine "*qui facit per alium facit per se*" applies to the liability for libel by the agent or associate of the accused: Newell on Def. Slander and Libel, page 228, citing Flood on Libel and Slander, page 43.

But as a part of this rule the liability of the dealer for the publication of a libel by his agent evidently depends upon such publication being in the course of the business or employment authorized.

So it has been held that one partner, in the business of selling furniture and draperies, was not liable for a libelous placard placed, without his knowledge or consent, by his co-partners upon a table in front of their shop, which read as follows : " Taken back from Dr. W., who could not pay for it, to be sold at a bargain ; " and on a separate card, " Moral : Beware of dead-beats." The court says, " There is nothing in the nature of the business of this firm . . . from which authority to one partner or to a servant to gratuitously publish a libel can be implied. The case is different from that of a partnership whose business is publishing or selling either books or newspapers, where each partner is supposed to have authority to publish or sell, and to determine what shall be published or sold, and also from that of the necessary correspondence of a firm where each partner is presumed authorized to conduct it and to determine on its substance and terms." See *Woodling v. Knickerbocker*, (Minn.) 17 N. W. 387.

From this brief collocation of cases and authorities we may conclude that a newsdealer is not liable under our own or English law for the sale in his shop, even by his own hand, of a libelous publication if he did not know it to be such, had no occasion to suspect that it contained libelous matter, and was guilty of no negligence in not discovering its character. But that, since the partner or servant of a newsdealer is authorized to give out for him whatever is in the line of goods dealt in, that the absent partner or master is liable for the act of the representative or servant in the course of the business, as if the act were his own. That, under the general doctrines applicable to principal and agent, neither newsdealer nor other dealer is liable for unauthorized acts of partner or servant done without his knowledge and outside of the scope of the partnership or agency ; but that as to all sales of publications coming within a news vendor's business, he is liable, if made in his shop in his absence, in the same manner as if he were present.

It seems, thus, that an innocent person may be guilty of libel through the act of one for whom he is responsible. That this hardship upon the innocent culprit is logical and necessary

to protect the equally innocent and otherwise defenseless injured
person from that blighting crime of defamation

"Whose edge is sharper than the sword, whose tongue

"Outvenoms all the worms of Nile, whose breath

"Rides on the posting winds, and doth balls

"All corners of the world."

Charles Noble Gregory.

College of Law,

University of Wisconsin.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

According to a recent decision of the Supreme Court of Pennsylvania, a mortgagee who contracts for a first lien may recover the difference in value between that and what he gets, from the attorney who undertakes to search the record for her, but negligently overlooks prior liens; and may sue as soon as the inadequacy of her security becomes apparent, without waiting to see if any loss will result from an attempt to collect the loan. *Lawall v. Groman*, 37 Atl. Rep. 98.

Whenever one fails to perform a duty imposed by contract, the mere breach of duty is supposed to cause damage to the other party. A right of action in assumpsit or tort, therefore, accrues at the moment of the breach, for nominal damages at least, and the statute of limitations runs against it from that time: *Brown v. Howard*, 2 Brod. & B. 73, 1820; *Battley v. Faulkner*, 3 B. & Ald. 288, 1820; *Betts v. Norris*, 21 Me. 314, 1842; *Schade v. Gehner*, (Mo.) 34 S. W. Rep. 576, 1896; *Bk. of Utica v. Childs*, 6 Cow. (N. Y.) 238, 1826; *Kerns v. Schoonmaker*, 4 Ohio, 331, 1830; *Townsend v. Eichelberger*, 51 Ohio St. 213, 1894. This principle applies to an action for negligence on the part of an attorney, which is a breach of his contract of service: *Short v. McCarthy*, 3 B. & Ald. 626, 1820; *Howell v. Young*, 5 B. & C. 259, 1826; *Green v. Dixon*, 1 Jur. 137, 1837; *Blyth v. Fladgate*, [1891] 1 Ch. 337, 1890; *Wilcox v. Plumer*, 4 Pet. 172, 1830; *Denton v. Embury*, 5 Eng. (Ark.) 228, 1849; *Crawford v. Gauden*, 33 Ga. 173, 1862; *Lilly v. Boyd*, 72 Ga. 83, 1883; *Gould v. Palmer*, (Ga.) 22 S. E. Rep. 583, 1895; *Stafford v. Richardson*, 15 Wend. (N. Y.) 302, 1836; *Arnold v. Robinson*, 3 Daly, (N. Y.) 298; *Douglass v. Corry*, 46 Ohio St. 349, 1889; *Campbell v. Boggs*, 48 Pa. 524, 1855; *Moore v. Juvenal*, 92 Pa. 484, 1880; *Thomas v. Erwin*,

Cheves, (S. Car.) 22, 1839. The measure of damages in such a case is the injury that appears to have been caused at the time by the negligent act; *e. g.*, in taking insufficient security for a loan, the difference between the value of the loan and the actual value of the security with interest and costs: *Russell v. Palmer*, 2 Wils. 325, 1767; *Allen v. Clark*, 11 W. R. 304, 1863; *Lourenburg v. Wolley*, 25 Can. S. C. R. 51, 1895; *Miller v. Wilson*, 24 Pa. 114, 1854.

One who finds the ticket office at a station closed, and gets upon a train in ignorance of the fact that it does not stop at the station to which he wishes to go, is not a **Carrier,** trespasser, but is entitled to remain on the train, **Passengers** as a passenger, to the first regular stopping place, by paying his fare thereto; and the offer of a person, in company with the plaintiff and others on a train, to pay fare for all the party, accompanied with the taking out of his pocket **Tender of** money more than sufficient to pay all their fares, **Fare** before the conductor ordered the plaintiff off or made any attempt to stop the train, is a sufficient tender of fare to make a subsequent refusal of the conductor to carry them, followed by their expulsion, wrongful: *Baltimore & Ohio R. R. Co. v. Norris*, (Appellate Court of Indiana,) 46 N. E. Rep. 564.

When a train runs beyond a passenger's station, at night, without his knowledge, it is not negligence for the passenger to assume that the car is at the station platform, **Contributory** if invited to alight by the employes of the carrier, **Negligence** the ground being so covered with snow that its surface could not be distinguished: *Chesapeake & Ohio Ry. Co. v. Fried*, (Court of Appeals of Kentucky,) 39 S. W. Rep. 704.

The Court of Appeals of New York has practically reversed the ruling of the Appellate Division of the Supreme Court, **Constitutional** *People v. Hawker*, 43 N. Y. Suppl. 516; 36 **Law,** **Ex Post Facto** **Law** *Am. L. REG. N. S.* 256, that a statute declaring guilty of a misdemeanor any one who, after conviction of a felony, shall practice medicine, applies to one convicted before the passage of the act, and is not *ex post facto*.—

although the judgment of conviction was affirmed: *People v. Hawker*, 46 N. E. Rep. 607. Three only, of the seven judges maintained this point. Two concurred in the result solely on the ground that the record did not show that the defendant was ever a physician, and the other two dissented. (*See note in this number.*)

The Supreme Court of Errors of Connecticut has lately ruled that it is within the police power of the legislature to order the destruction of a tree affected by the "peach yellow," without compensation to the owner, and against his will, and may impose a fine for failure to destroy the trees condemned; and since the summary destruction by the state of trees affected with "peach yellows" is within the rule that whatever is dangerous to public health may be summarily abated, the owner has no right, before the trees are condemned, to a jury trial of the question whether they are so diseased: *State v. Afain*, 37 Atl. Rep. 80.

In response to interrogatories submitted to it by the Senate, the Supreme Court of Colorado has declared, that legislation which has for its object the protection of laborers from oppression and fraud, by prohibiting employers from issuing, in payment of wages, scrip or store orders redeemable in goods at exorbitant prices, may properly be enacted under the police power of the state; but that if such a statute undertakes to regulate the prices at which merchandise shall be sold by an employer to his employes for cash, it is unconstitutional: *In re House Bill, No. 147*, 48 Pac. Rep. 512.

The Supreme Court of Kansas has recently decided that a notary public has no power to commit for contempt a witness, who, having been duly subpoenaed before him, refuses to be sworn or to give his deposition; and a statute which purports to confer such a power is unconstitutional: *In re Haron*, 48 Pac. Rep. 574.

It is a criminal contempt to publish of a judge, that his decision in a case pending is influenced by political or money considerations, and the offender may be imprisoned therefor, as

Contempt,
Powers of
Notary Public

Police Power

Scrip and
Store Order
Acts

well as fined: *Bloom v. People*, (Supreme Court of Colorado,) 48 Pac. Rep. 519.

The Supreme Court of Ohio has applied the familiar rule that parties cannot oust the jurisdiction of the courts by contract, to the rules of a railway relief department, which provided that all claims of beneficiaries should be submitted to the determination of the superintendent, whose decision should be final and conclusive, unless appealed to the advisory committee, and in case of such appeal the decision of the committee should be final and conclusive upon all parties, without exception or appeal,—holding that after the rejection of a valid claim by the advisory committee, the beneficiary could maintain an action for the recovery of the money due thereon, in spite of that rule: *Baltimore & Ohio R. R. Co. v. Stanhard*, 46 N. E. Rep. 577.

When an insolvent merchant procures the organization of a corporation, retaining substantially all of the stock therein, and transferring the bulk of his property to it, for the purpose of delaying and hindering his creditors, and no innocent person contributes any substantial sum to the assets of the corporation, the whole transaction is a sham, and the property of the corporation may be levied upon by the creditors of the promoter, and sold to satisfy their claims: *Kellogg v. Douglas Co. Bk.*, (Supreme Court of Kansas,) 48 Pac. Rep. 587.

The Supreme Court of Colorado has ruled, in accordance with the weight of authority, that in the absence of any statute changing the rule of the common law, the district attorney, who represents the attorney general in his own district, has the power to enter a *nolle prosequi* in a criminal case without the consent of the court: *People v. District Court of Lake Co.*, 48 Pac. Rep. 500.

This power is not unlimited, however. There are three stages in a criminal prosecution, viz.: (1) The inauguration or

preliminary stage, when the indictment is absolutely under the control of the prosecuting officer ; (2) The trial of the cause and its incidents, during which the court has control, and the power of the prosecuting officer is suspended ; and (3) The period between the verdict of the jury and sentence by the court, when the pardoning power of the governor attaches : *State v. Moise*, (La.) 18 So. Rep. 943, 1895. Accordingly, the power of the district attorney to enter a *nolle prosequi* is subject to the following limitations : (1) After the jury has been impaneled and the charge read, he cannot discontinue if the defendant insists upon a verdict ; and (2) After verdict and refusal to grant a new trial, he cannot dismiss the prosecution without the leave of the court : *State v. Klock*, (La.) 18 So. Rep. 942, 1895. See 35 AM. L. REG. N. S. 7.

The Queen's Bench Division has lately held, that when a voter has the option of cumulating his votes, he must indicate an intention to do so by putting opposite the name of the candidate for whom he intends to cumulate either crosses or figures indicating the number of votes he intends to cast for him ; and that if he does not do so, the court will not presume that he intended to cast but a single vote, although he marks but a few names or only one : *Morris v. Brues*, [1897] 1 Q. B. 449.

In this case, there were fifteen candidates to be elected. Some of the voters marked a cross opposite the name of but one candidate, and others opposite three, five, or more ; but in each case it was held that but one vote could be counted for the candidates marked, in the absence of figures or crosses to indicate a different intention.

According to a recent decision of the Supreme Court of Pennsylvania, under the ballot laws of that state, which authorize no additions to the official ballot except the insertion of names in blank spaces under the titles of offices thereon, there can be no election to an office, the name or title of which is not printed on the ballot, by putting on stickers bearing the title of the office and the name

Elections,
Marking
Ballots,
Cumulative
Voting

Stickers

of the candidate: *In re Contested Election of Lawlor*, 37 Atl. Rep. 92.

The Australian ballot laws do not prohibit the use of printed adhesive slips, or "stickers:" *DeWalt v. Bartley*, 146 Pa. 529, 1892, affirming 1 D. R. (Pa.) 199, 1892; but under the decision above, they must contain only the name of the candidate to be voted for, and be inserted in the proper space in the blank column printed for that purpose. *A fortiori* these laws do not permit the use of a printed blanket slip of the size of a column of the official ballot, with the names of a series of candidates, by the pasting of which on the ballot the titles of offices and the spaces for candidates' names designated on the official ballot are obliterated. Other considerations apart, the use of such a slip would enable the voter to prepare his ballot outside of the voting room, contrary to the requirements of the act: *In re Contested Election of School Directors of Little Beaver Twp.*, 165 Pa. 233, 1895, affirming 15 Pa. C. C. 81, s. c., 3 D. R. 685, 1894.

The Supreme Court of Wisconsin has lately held, that the construction and operation, on a public street, of an electric railway extending between two or more towns or villages, and incorporated for the transportation of merchandise, personal baggage, mail and express matter, as well as passengers, imposes an additional burden, for which the abutting owners are entitled to compensation, and is not merely an exercise of the public easement previously acquired by the construction of the street: *Chicago & N. W. Ry. Co. v. Milwaukee, R. & K. Electric Ry. Co.*, 70 N. W. Rep. 678.

According to another decision of the last mentioned court, when a mortgagee agrees to discontinue foreclosure, in consideration of the application of the rents of the mortgaged land on his debt, and the mortgagor instructs his agent to pay over the rents, as collected, to the mortgagee, this instruction constitutes an equitable assignment of the rents, so that, when collected and

Eminent
Domain,
Additional
Servitude

Equitable
Assignment,
Rents

PROGRESS OF THE LAW.

in the hands of the agent, they are not subject by a judgment creditor of the mortgagor. 70 N. W. Rep. 660.

The Supreme Court of Tennessee has held that a decree simply adjudged a husband, who was the wife, individually liable for a debt of the wife, on the ground that he had received from her former trustee an estate more than sufficient to pay the debt, a bill by the creditor to charge the wife's separate estate with the debt was a bill to charge the debt, and could not lie, although the decree recited that "for the payment of said debt said estates were liable;" no estate being described or ordered to be sold to satisfy the debt: *Hobbs v. Rice*. 39 S. W. Rep. 718.

When a grantor who has no title purports to grant a particular piece of land by deed to one for life, with remainder over, and the grantee for life enters upon the land under the deed, and acquires a good title by prescription against the true owner, he is estopped against the remainderman from disputing the validity of the deed: *Dalton v. Fitzgerald*. (Chancery Division, Stirling, J.,) [1897] 1 Ch. 440.

On an issue as to the substance of a conversation carried on by telephone, one of the speakers testified that he repeated to a third person what he had heard from the other: *Gorman v. Gorman*. (Sup. Ct. Iowa,) 70 N. W. Rep. 769.

A false representation that one has extraordinary natural power to cure disease is a representation of an existing fact, and is not affected by a representation simultaneously made, to exercise power in the future to cure the person to whom the representation is made: *Jules v. State*, (Court of Maryland,) 36 Atl. Rep. 1027.

This decision is supported by the weight of authority.

Giles, 10 Cox C. C. 44, 1865; *R. v. Lawrence*, 36 L. T. N. S. 404, 1877; *Commonwealth v. Gordon*, 15 W. N. C. 282, 1884. The case of *State v. Burnett*, 119 Ind. 392, S. C. 21 N. E. Rep. 972, 1889, which decided, on the other hand, that a claim by the defendant that he was a witch doctor, and had the power to kill witches, that the prosecutor was being bothered and tormented by witches, and that if the prosecutor would give him certain articles he would kill and destroy all the witches and save the prosecutor and his family from further trouble, was not a false pretence, because it was not such a representation as a man of common understanding was justified in relying on, and was not a representation of an existing fact, but a mere expression of opinion, is without authority. A false pretence need not be in regard to a fact which does in reality exist, but may be a representation that a fact exists when it does not exist. See 14 CRIM. L. MAG. 1, 4.

A paper purporting to authorize the bearers to solicit subscriptions for a labor organization is not a "letter of attorney,"

or an "order for money," within the meaning of a statute inaking such instruments the subject of forgery: *People v. Smith*, (Supreme Court of Michigan,) 70 N. W. Rep. 466.

In *Edelman v. Latshaw*, (Supreme Court of Pennsylvania,) 36 Atl. Rep. 926, an executor sold some certificates of stock, belonging to the estate of his father, and considered worthless, for a nominal sum. He subsequently received a letter, directed to the decedent, offering two dollars a share for the stock; whereupon he tried to repurchase it from the purchaser at the sale, stating to him that he wanted it, because his father had held it so long, and that it had no market value. On the strength of these representations, the stock was resold to him. After discovering the facts, the purchaser sued him for fraudulent representations; and the court below entered a compulsory nonsuit; but this judgment was reversed by the supreme court, which held that the action could be maintained.

Fraud,
Fraudulent
Representations

The Court of Appeals of Maryland, adopting the rule of reason and justice, has recently held, that under the Code of that State, Art. 99, § 13, as amended by the act of 1894, c. 404, which provides that "No person shall shoot or in any manner catch, kill, or have in his possession, . . . any rabbit, between the twenty-fourth of December and the first of November next ensuing," the possession between those dates, of rabbits lawfully killed in another state, is not unlawful: *Dickhaut v. State*, 37 Atl. Rep. 21.

There is a note on this subject in 35 AM. L. REG. N. S. 649. To the cases there cited as upholding the rule laid down above, may be added *State v. McGuire*, 24 Oreg. 367, 1893.

When a garnishee corporation, doing business in two states, has been compelled to pay a judgment rendered against it in the courts of one state, that judgment may be pleaded in bar in garnishment proceedings in another state at the suit of another creditor to reach the same debt, though the latter suit was commenced first: *Lancashire Ins. Co. v. Corbetts*, (Supreme Court of Illinois,) 46 N. E. Rep. 631.

In *State v. Countryman*, 48 Pac. Rep. 137, the Supreme Court of Kansas has decided that a man has no right to repel a "charivari" party by the use of deadly weapons, on the principle that although one may defend himself and his family with such weapons from a felonious assault, if necessary to protect them from such assault, and may also defend his habitation from a like assault by the use of like weapons, if necessary to preserve it from destruction or serious injury, he has no right to resist with such weapons an attack upon his person, family, or habitation which is not felonious,—i. e., an assault not made under such circumstances, and with such means, and under such appearances as to justify a belief in imminent danger of great bodily harm to the person, or destruction or serious injury to the habitation—such as the attack of such a party.

This lays down a stricter rule than that announced by the

Garnishment,
Judgment
Rendered in
One State,
Bar to Action
in Another

Homicide,
Self Defense,
Imminent
Danger,
Charivari

Supreme Court of Michigan in *Patten v. People*, 18 Mich. 314, 1869, under similar circumstances, where the defendant, fearing that his mother might be seriously injured by fright caused by the noise, went out of the house with an axe in his hand, hit one of the party a blow with the axe, which resulted in his death. The court held, per Christianity, J.: "There was evidence—and the statement of the prisoner made in the trial must for this purpose be treated as such—from which the jury might have found (as supposed in part of the charge given by the court below) that the defendant took the axe from the house for the purpose of self defense, and stepped out of the door for the purpose of inducing the rioters to leave, or of dispersing them: and that as he stepped out, the crowd cried out, 'Kill him, damn him, kill him,' and that rushing towards him, some one or more of them hit him with a gun or club or other weapon. If this hypothesis should be found to be true, instead of the charge given by the court, the jury should, I think, have been told substantially that the defendant was excusable for acting according to the surrounding circumstances as they appeared to him; and if, from these circumstances, he believed there was imminent danger of death or great bodily harm to himself or any member of his family, then, if he had already tried every other reasonable means which would, under the circumstances, naturally occur to an honest and humane man, to ward off the danger or repel the attack, he might resort to such forcible means, even with a dangerous weapon, as he believed to be necessary for protection; and if such means resulted in the death of any of the supposed assailants, the homicide would be excusable."

The Supreme Court of Minnesota has recently declared constitutional a statute, (Gen. Stat. Minn., 1894, § 5,165.)

Husband which provides, that "when a husband has deserted
And Wife, his family the wife may prosecute or defend in his
Desertion, name any action which he might have prosecuted
Rights of Wife or defended, and shall have the same powers and rights therein
as he might have had:" *Allen v. Minnesota Loan & Trust Co.*,
70 N. W. Rep. 800.

The conveyance of two hundred acres of land by a father to his minor children, in contemplation of a second marriage, is not in itself a fraud on the marital rights of the second wife, when he retains eighty acres, upon which are all the improvements made on his land: *Goodman v. Malcom*, (Court of Appeals of Kansas, Northern Dept., D. C.,) 48 Pac. Rep. 439.

The Supreme Court of Minnesota has joined the ranks of those who hold that under the married women's acts, a wife may maintain an action against persons who wrongfully entice her husband from her and alienate his affections, and thereby cause a separation between them: *Lockwood v. Lockwood*, 70 N. W. Rep. 784.

It seems never to have been seriously doubted that a husband has a right of action, *per quod consortium misit*, against one who alienates the affections of his wife; and it is the general doctrine that a wife has also a right of action against any one who alienates the affections of her husband, though unable to avail herself of it under the common law, because of the legal fiction of the merger of her identity in that of her husband. But where the married women's property acts are in force, this reason is removed, and the right of the wife to recover in such a case is commensurate with that of her husband, whether the statute confers upon her the express power of suing, or not: *Waldron v. Waldron*, 45 Fed. Rep. 315, 1890; *Williams v. Williams*, 20 Colo. 51, 1894; *Foot v. Card*, 58 Conn. 1, 1889; *Bassett v. Bassett*, 20 Ill. App. 543; *Haynes v. Nowlin*, 129 Ind. 581, 1891, overruling *Logan v. Logan*, 77 Ind. 558, 1881; *Wolf v. Wolf*, 130 Ind. 599, 1892; *Holmes v. Holmes*, 133 Ind. 386, 1892; *Warren v. Warren*, 89 Mich. 123, 1891; *Rice v. Rice*, (Mich.) 62 N. W. Rep. 833, 1895; *Clow v. Chapman*, 125 Mo. 101, 1894; *Nichols v. Nichols*, (Mo.) 35 S. W. Rep. 577, 1896; *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 1895; *Adams v. Seaver*, 66 N. H. 142, 1889; *Brciman v. Pasch*, 7 Abb. N. C. (N.Y.) 249, 1879; *Bahr v. Bahr*, 16 Abb. N. C. (N.Y.) 293, 1885; *Warner v. Miller*, 17 Abb. N. C. (N.Y.) 221, 1885; *Churchill v.*

Levis, 17 Abb. N. C. (N. Y.) 226, 1885; *Jaynes v. Jaynes*, 39 Hun. (N. Y.) 40, 1886; *Bennett v. Bennett*, 116 N. Y. 584, 1889, which finally overruled *Van Arnam v. Ayers*, 67 Barb. (N. Y.) 544, 1877; *Eldredge v. Eldredge*, 79 Hun. (N. Y.) 511, 1894; *Mainuwarren v. Mason*, 79 Hun. (N. Y.) 592, 1894; *Van Olinde v. Hall*, 88 Hun. (N. Y.) 452, 1895; *Contra, Doe v. Roe*, 82 Me. 503, 1890; *Duffies v. Duffies*, 76 Wis. 374, 1890. Accordingly, she may maintain an action on this ground against the paramour of her husband: *Foot v. Card*, 58 Conn. 1, 1889; or against the husband's parents: *Mcchrhoff v. Mcchrhoff*, 26 Fed. Rep. 13, 1886; *Williams v. Williams*, 20 Colo. 51, 1894; *Postlewaite v. Postlewaite*, 1 Ind. App. 473, 1891; *Railsback v. Railsback*, 12 Ind. App. 659, 1895; *Price v. Price*, 91 Iowa, 693, 1894; *Bailey v. Bailly*, (Iowa,) 63 N. W. Rep. 341, 1895; *Eldredge v. Eldredge*, 79 Hun. (N. Y.) 511, 1894; *Westlake v. Westlake*, 34 Ohio St. 621, 1878; or against any stranger, whose conduct has occasioned the alienation: *Lynch v. Knight*, 9 H. L. Cas. 577, 1861. But when the suit is against a parent, something more must be proved than mere advice to the husband to leave his wife, for a parent may, when acting in good faith, advise his son thus, without incurring liability: *Huling v. Huling*, 32 Ill. App. 519, 1889; *Rice v. Rice*, (Mich.) 62 N. W. Rep. 833, 1895; *Tucker v. Tucker*, (Miss.) 19 So. Rep. 955, 1896; *Pollock v. Pollock*, 29 N. Y. Suppl. 37, 1894; *Young v. Young*, 8 Wash. 81, 1894; and consequently the complainant in such a case must allege that the acts which produced the alienation were maliciously done: *Reed v. Reed*, 6 Ind. App. 317, 1892.

A wife may maintain such an action, though she be still living with her husband: *Foot v. Card*, 58 Conn. 1, 1889; or after divorce for the husband's fault, if the alienation occurred before the divorce: *Clew v. Chapman*, 125 Mo. 101, 1894; but if she leaves him of her own accord, before procuring a divorce, she cannot recover after it is procured: *Buckel v. Suss*, 21 N. Y. Suppl. 907, 1893, affirming 18 N. Y. Suppl. 719. She may recover for mental anguish, mortification, and injured feelings, occasioned by the loss of her husband's affections, without showing actual loss of support: *Rice v. Rice*, (Mich.)

62 N. W. Rep. 833, 1895; And may recover exemplary damages, under a statute (Laws Colo. 1889, p. 64,) authorizing such a recovery when the injury complained of is the result of a "wanton and reckless disregard of the injured party's rights and feelings:" *Williams v. Williams*, 20 Colo. 51, 1894. She cannot, however, bring an action of *crim. con.* against the paramour of her husband, even where the married women's property acts are in force: *Doe v. Roe*, 82 Me. 503, 1890; *Kroessin v. Keller*, 60 Minn. 372, 1895.

According to a recent decision of the Supreme Court of Oklahoma, when two parties are contending before the United States land department for a tract of government land, and the final decision is had in favor of one of them, the successful party may bring an action in the territorial court for an injunction to restrain his adversary from further interfering with his possession of the premises; and in that cause the court may properly award an injunction which prevents the unsuccessful party from remaining in occupation of the disputed premises: *Barnes v. Newton*, 48 Pac. Rep. 190.

This follows two prior decisions of the same court: *Reaves v. Oliver*, 3 Okl. 62, 1895; *Woodruff v. Wallace*, 3 Okl. 355, 1895.

When an accident insurance policy is issued, renewable yearly as long as the assured pays the specified premium in advance and the insurance company consents to receive it, and requiring the assured at each renewal to give notice of any change in his state of health since the payment of the last premium, with power for the company in each case to determine the policy, an entirely new contract arises upon the payment of the premium for each year, for that year only, and the amount payable under it on the accidental death of the assured in the current year for which a premium has been paid is not affected by any assignment or other obligation made or entered into by the assured in any previous year and not extending to after-acquired

Injunction
To Restrain
Interference
with
Possession of
Land

Insurance,
Accident,
Renewal,
Effect

property: *Stokell v. Heywood*, (Chancery Division, Kekewich, J.) [1897] 1 Ch. 459.

A plaintiff who is injured by falling from his bicycle while returning home from a friend's funeral, on Sunday, though not by the direct road, may recover under a policy of accident insurance, though it contains a clause preventing recovery for an injury received "while or in consequence of violating any law." Riding to a funeral, or walking or riding for health or exercise, on Sunday, does not fall within the prohibition of the Sunday laws: *Eaton v. Atlas Accident Ins. Co.*, (Supreme Judicial Court of Maine,) 36 Atl. Rep. 1048.

The Supreme Court of Mississippi, in *Stephens v. Railway Officials' & Employees' Acc. Assn.*, 21 So. Rep. 710, has rendered a very important decision in regard to the construction of an accident insurance policy. The first paragraph of the policy in question provided for insurance against death or injury by external means leaving a visible mark on the body. A subsequent independent paragraph covenanted to pay one-tenth the value of the face of the policy if the injury causing death left no visible marks, "or if such injury or death shall result from the intentional acts of any person other than the insured." The death of the insured resulted from the intentional act of another, which left its visible mark on his body, and the court held that the beneficiary was entitled to recover the whole amount of the policy.

The Court of Errors and Appeals of New Jersey has lately passed upon a very interesting point of insurance law, in

Lauer v. Gray, 37 Atl. Rep. 52. The plaintiffs held a policy of insurance against the loss of credits for goods shipped and loss occurring between the commencement and expiration thereof, which contained a provision that "if this certificate is renewed by the said above-named party on or before the date of its expiration, at the regular terms of the company in force at the time of such renewal, then, in that case, losses occurring after the expiration of this certificate on goods shipped between the commencement and the expiration thereof shall be provable under the renewal in the same manner as if losses occurred

on goods shipped after the commencement of the renewal." Losses occurred upon this original policy in accordance with its terms and conditions, which, upon adjustment and allowance by the insurers, were not paid to the insured, but retained by the insurers, under an agreement made subsequent to the expiration of the policy, that upon the cancellation thereof such losses should serve as the payment of a premium for a renewal policy; but these losses were not adjusted, the original policy was not cancelled, and the renewal policy was not executed and delivered until after the original policy had expired. The insurer subsequently went into the hands of a receiver, who refused to allow a claim for losses on goods shipped during the life of the original policy, but occurring after its expiration, under a condition in the renewal policy that "if this certificate has been paid for on or before the date of the expiration of the certificate held by the above-named party last prior to this one, then, in that case, losses occurring during the life of this certificate on goods shipped during the term of the last prior one shall be included in the calculation of losses under this certificate, in the same manner as if the goods had been shipped and the loss had occurred during the life of this certificate," on the ground that the premium was not paid on or before the expiration of the prior policy, and the new policy was therefore not a renewal. The plaintiffs appealed to the court of chancery, which dismissed their petition; but this decree was reversed by the court of errors and appeals, which held that the retention of the losses on the first policy under the agreement constituted payment of the renewal premium "on or before the date of the expiration" of the original policy, and was a sufficient compliance with the last-named condition; that the two policies were connected together, and had reference to each other; that the adjustment of loss, the cancellation of the first policy, the agreement to retain the loss in lieu of renewal premium, and the execution and delivery of the renewal policy, had relation to the life of the prior policy the losses upon which, by virtue of the agreement, constitute the payment of the renewal premium, by reason of the situation which existed before the expiration of the original policy

to which the renewal had reference; that it was immaterial, under the circumstances, that the execution and delivery of the renewal was postponed until the adjustment of the losses and the cancellation of the former policy could be accomplished; that when the obligation of the insurer to issue and deliver the certificate of renewal, accepting, in payment of the renewal premium, the losses coming to the insured upon the prior policy when these were adjusted and the policy cancelled, was established, the payment related back to the life of the prior policy, and was of the time during which those losses occurred; and the mere delay during negotiations, to put the obligation into a written agreement or contract, or to embody it in a formal certificate of renewal, did not alter or extinguish that obligation; and that equity will impute the intention to fulfil such an obligation, and when necessary to protect and enforce the just rights of the parties, will assume the obligation to have been fulfilled, in accordance with the principle that equity looks upon that which ought to be done as already done.

When a life insurance policy provides that if, within two years from the date thereof, "the said assured shall, whether sane or insane, die by his own hand, then this policy shall be null and void," the insurer will not be liable if within the two years, the assured, whether sane or insane, commits suicide, and the liability of the insurer is not affected by the degree of insanity: *Spruill v. Northwestern Mut. Life Ins. Co.*, (Supreme Court of North Carolina,) 27 S. E. Rep. 39.

In this case the proof of death stated that the assured died by a "pistol shot from his hand;" and this, unexplained, was held to throw on the plaintiff the burden of proof that the decedent did not commit suicide, and to warrant the directing of a verdict for the defendant.

When a landlord undertakes to put a new roof on the demised premises, at the request of his tenant, he will be liable to the tenant for injury caused by the negligent manner in which the work is done, and cannot exonerate himself by committing it to an independ-

Life
Insurance,
Suicide
Landlord and
Tenant,
Repairs,
Negligence

ent contractor: *Wertheimer v. Saunders*, (Supreme Court of Wisconsin,) 70 N. W. Rep. 824.

The Superior Court of Pennsylvania has recently held, that a charge that a candidate for public office "did violate the law and take fees to which he was not entitled," is libelous *per se*; that although it was made on a proper occasion and from a proper motive, the plaintiff being at the time a candidate for office, the defendant will not be relieved of responsibility when he not only fails to show the truth of the statement but also to establish that it was based on a reasonable or probable cause; and that in such a case it is not sufficient to show that the defendant had information which led him to believe it was true; but that the circumstances leading to that belief must be shown, in order that it may appear whether or not it was well founded: *Coates v. Wallace*, 4 Pa. Super. Ct. 253.

A publication in a newspaper, falsely charging a police officer with extortion, in purposely swelling the amount of a prisoner's fine, collecting the same of the prisoner's family to procure his discharge and pocketing the difference, is libelous; and though it was made without malice or improper motives, and for the dissemination of news and information to the citizens of the locality, it is not privileged thereby: *Benton v. State*, (Court of Errors and Appeals of New Jersey,) 36 Atl. Rep. 1041.

In a case recently decided by the Court of Appeal of England, *Tate v. Latham*, [1897] 1 Q. B. 502, the plaintiff was employed at defendant's saw-mills to assist one of their sawyers, who was engaged at a circular saw. The defendants had provided the saw with a sufficient guard or fence under the bench for the prevention of accidents. The guard was made moveable, in order to remove the sawdust which collected under the bench. The sawyer improperly removed the guard for his own purposes, and while it was off the plaintiff fell against the saw and was injured. The absence of the guard

Libel,
Candidate
for Office,
Privileged
Communications

Libel,
Privilege,
Dissemination
of News

Master and
Servant,
Defective
Machinery,
Act of Fellow
Servant

was held to be a defect in the condition of the machinery, within § 1 of the Employers' Liability Act, 1880, which gives a workman the same remedy against his employer as if he had not been in his service, when personal injury is caused to him "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer."

This would not be law in the United States at the present time; but as the day is not far distant when we shall have statutes similar to the one cited, it is worth while to study its interpretation, in order that we may know the consequences of such legislation. The ruling in this case certainly tends to overthrow all the established rules as to the negligence of fellow servants.

The motorman of an electric street railway car, who occupies a position analogous to that of the engineer of a steam railroad train, is a fellow servant with the track foreman: *Rittenhouse v. Wilmington St. Ry. Co.*, (Supreme Court of North Carolina,) 26 S. E. Rep. 922.

A payment on a mortgage, made by an owner of the equity of redemption of part of the premises, before the statute has run against the right of redemption, will inure to the benefit of the owners of the equity in the other portion of the mortgaged land, and remove the bar of the statute as to the whole: *Longstreet v. Brown*, (Court of Chancery of New Jersey,) 37 Atl. Rep. 56.

The Supreme Court of Kansas has adopted the rule of reason and justice, now almost everywhere prevalent, that the negligence of a husband cannot be imputed to his wife, who is riding with him over a defective highway, unless it can be shown that the husband was at the time under the direction and control of the wife; and this, even though the journey was undertaken at the

solicitation of the wife. The latter fact is immaterial: *Reading Twp. v. Telfer*, 48 Pac. Rep. 134.

There is a full annotation on this subject in 32 AM. L. REG. N. S. 763 *et seq.*; and short notes in 33 AM. L. REG. N. S. 314, 870; 34 AM. L. REG. N. S. 97, 229, 567, 643; 35 AM. L. REG. N. S. 527.

In *Boatwright v. Chester and Media Electric Ry. Co.*, 4 Pa. Super. Ct. 279; the defendant company had sent out an excursion train, (so the opinion reads,) of three cars, in charge of a motorman and two conductors, with about two hundred and twenty-five passengers. As the cars neared the plaintiff, who was riding in a buggy with a friend, the passengers became uproarious, blew horns, waved flags, etc., and frightened the horse so that he ran away, upsetting the buggy and injuring the plaintiff. The trial judge refused to charge that the verdict of the jury must be for the defendant; and the Superior Court held this to be error, and reversed the judgment, which was for the plaintiff, on the sole ground that the company was not responsible for the noise made by the passengers.

The reasons for this holding appear from the opinion of the court: "If the company deliberately loaded its cars with excursionists equipped with horns and flags, knowing they intended to wave flags and blow horns along the route, and thereby frighten horses lawfully upon the highway, for such conduct it might be held liable. Or if it knowingly permitted such demonstrations from time to time as a part of its business upon the road, so as to become a nuisance and constant menace to persons driving vehicles upon the highway, they undoubtedly would be liable for the result of such nuisance and menace. *But there are no such circumstances in this case.* There was no evidence that the company, its conductors or employes, anticipated any unusual noise on the part of the passengers. . . . The company was under no obligation to provide a police force in anticipation of riots. . . . The sudden outburst of passengers in a noisy demonstration was not an occurrence that the appellant was bound to anticipate or guard against."

Street
Railways.
Disorderly
Conduct of
Passengers.
Liability of
Company

According to the Supreme Court of Pennsylvania, a gift of a pension check for an amount exceeding twenty-five dollars, by a pensioner of the United States, in consideration that the donee would provide for him during the rest of his life, and for his burial on his death, is not invalid under the pension laws of the United States, which provide that the fee for prosecuting a pension claim shall not exceed twenty-five dollars, though the gift be to the attorney who procured the allowance of the pension, and be made as a result of the donee's services in securing the pension: *Schwab v. Ginkinger*, 37 Atl. Rep. 125.

The Supreme Court of Iowa has lately ruled that in an action against a physician for malpractice, it is not erroneous to charge that he is required "to exercise the degree of skill possessed by physicians practising in *this* locality," instead of "that possessed by physicians practising in *similar* localities:" *Whitesell v. Hill*, 70 N. W. Rep. 750.

When a testator wills his property to his wife during widowhood, with absolute power to dispose of it by will, and she executes this power by devising the property to volunteers, leaving debts of her own unprovided for, the property so devised becomes a part of her estate on her death, and is subject to the claims of her creditors: *Freeman v. Butters*, (Supreme Court of Appeals of Virginia,) 26 S. E. Rep. 845.

In *Burke v. Short*, (Circuit Court of Appeals, Sixth Circuit,) 79 Fed. Rep. 6, a decree for the distribution of the proceeds of a sale under the foreclosure of a mortgage, which provided that the coupons of the bonds secured by it should be preferred over the principal, directed that the surplus, after paying preferred claims, should be equally divided among the bonds, paying a certain sum, less than the face of the bond, to the holder of each bond. Some of the coupons which had matured prior to the

Pension,
Illegal Fee

Physicians,
Degree of
Skill

Power,
To Dispose of
Property by
Will,
Execution,
Effect

Railroad
Bonds,
Coupons,
Foreclosure,
Distribution
of Proceeds

foreclosure were subsequently detached from the bonds, and their holder petitioned to intervene, in order to collect the coupons. The circuit court of appeals held, affirming the decision of the circuit court, that though the decree mentioned bonds only, it could not be construed as intended to disregard the preference of the coupons, but was intended to deal with the ownership of bonds with their coupons, when the holders of each were the same, and that the holder of the detached coupons was therefore entitled to be paid their full value; and further, that coupons which had not matured at the time of the foreclosure, though merged thereby in the principal of the bonds, were entitled, when detached and separated from the bonds in ownership, to be paid proportionately with the remainder of the principal.

The Supreme Court of Appeals of Virginia has recently decided, that a railroad company, which purchased the property and franchises of another railroad company at foreclosure sale, will not be compelled by mandamus to continue to maintain and operate a branch road, the maintenance and operation of which with its terminal has proved for several years a serious loss to the company, when the same business can be handled with reasonable facility, and at much less expense, through another terminal, although the terminal abandoned was constructed in consideration of a subscription to the stock of the original company by the town in which the terminal was situated, and although the Code of Virginia, § 1234, as amended by Acts Va. 1891-2, p. 623, provides that a corporation which purchases the property of another at foreclosure sale, or succeeds it by reorganization, shall perform the duty "of maintaining and operating any branch or lateral road which may have been constructed and operated before the sale:" *Steelewood v. Atlantic & Danville R. R. Co.*, 26 S. E. Rep. 943.

While this decision may be law to the extent that the courts will not enforce the doing of a useless thing, it certainly is bad morals to permit a duty incurred on a valid consideration, performed by the other party, to be lightly violated in this way;

and though the corporation may not be compelled to perform the duty, it should certainly be held to have forfeited its franchises by refusing to perform it.

Similarly, mandamus will not lie to compel a street railroad company to continue to operate its lines over certain streets, when its charter imposes no specific obligations, and the ordinance giving the franchise on the streets merely granted "the privilege" of constructing and maintaining street railways over the lines designated therein: *San Antonio St. Ry. Co. v. State*, (Supreme Court of Texas,) 39 S. W. Rep. 926, reversing 38 S. W. Rep. 54.

The Supreme Court of the United States has recently held, in *Gladson v. State of Minnesota*, 17 Sup. Ct. Rep. 627, affirming 57 Minn. 385, that a state statute (Laws Minn. 1893, p. 173.) requiring every regular passenger train running wholly within the limits of the state to stop at all stations at county seats directly in its course, to take on and discharge passengers, is a valid exercise of the police power of the state, and is neither a taking of the property of the company without due process of law, nor an unconstitutional interference with interstate commerce or with the transportation of the United States mails.

Since a telegraph company has the right to choose its own agencies for the delivery of messages, and to require that messages given it for transmission shall be in writing, it is not a discrimination against one telephone company to refuse to deliver telegrams to its subscribers by its telephones, paying it for the use of them, or to receive messages by its telephones to be telegraphed, though by contract with another telephone company messages are so delivered and received by means of its telephones: *People v. Western Union Tel. Co.*, (Supreme Court of Illinois,) 46 N. E. Rep. 731.

It was also held in this case that a statute requiring a telegraph company to receive and transmit messages from

other telegraph companies, does not compel it to receive verbal messages by telephone.

In *Hill v. Hill*, [1897] 1 Q. B. 483, the Court of Appeal of England recently held that a statement by the widow of a peer in a letter or memorandum sent to her solicitor **Trust.** that certain diamonds had been given to her upon **Precatory** her marriage by the mother of her husband, then heir presumptive to the peerage, for her life, with the request that at her death they might be left as heirlooms, did not import a precatory trust, and that the absolute property in the diamonds consequently passed to the donee.

The legislature only, and not the state officers, has power to accept a bequest to the state in trust; the adoption by both **Will,** houses of the legislature of the report of a joint **Bequest to** committee, recommending that a bill accepting a **State,** bequest to the state be not passed, is a rejection **Rejection** of the bequest; and evidence that the committee was misled by a decision construing the will is inadmissible, when the reasons of the committee for its action were not reported to the legislature, since the reasons for the action of individual members are not admissible to affect a legislative act: *State v. Blake*, (Supreme Court of Errors of Connecticut,) 36 Atl. Rep. 1019.

Ardemus Stewart.

THE AMERICAN LAW REGISTER AND REVIEW

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RESIGNATION OF PROF. PARSONS. We note with regret that Prof. James Parsons has resigned the chair of Partnership and Decedents' Estates, in the Law Department of the University of Pennsylvania. Professor Parsons has been connected with the Department twenty-two years, and the depth of his scholarship, the breadth of his learning, were never shown more conspicuously than in the last year of his service.

THE HENRY M. PHILLIPS PRIZE. The American Philosophical Society announces a prize of two thousand dollars in gold for the best essay on the following subject: *The development of the law, as illustrated by the decisions relating to the police power of the State.* Each essay must consist of not more than one hundred thousand words, and must reach Frederick Fraley, president of the American Philosophical Society, No. 104 South Fifth street, Philadelphia, not later than May 1, 1899. Full information will be sent on application to the Society.

USURY; CONTINGENT PAYMENT. The question of what constitutes usury has again been raised in the case of *Missouri, Kansas & Texas Trust Co. v. Krumseig*, 77 Fed. 32 (1897), which followed the decision in *Missouri, Kansas & Texas Trust Co. v. McLachlan*, 61 N. W. 560 (1894).

It has long been held that where the lender demands an excessive rate of interest, and at the same time there is a contingency upon the happening of which he gets no interest at all, or loses both principal and interest, the risk to the lender prevents the contract from being usurious. If the contingency operates to give the lender less than his due, the alternative possibility of his getting more is not illegal. But this exception to the usury law should not be broadly applied; if the lender, in the event of either alternative, is sure of his principal and legal interest, and the contingency merely affects his receipt of the excessive interest, he has nothing at stake to be lost by the happening of the contingency, and the contract is within the usury laws. Thus where the money is lent at the legal rate of interest, and the debtor is obliged to take out from the lender a policy on the debtor's or another's life, and pays to the lender the premiums on that policy, the loan and the contract of insurance are held to be one transaction, and the risk to the lender being only that he will not get the premiums, or excessive interest, if the life insured come to an end, the contract is usurious: *Missouri Valley Ins. Co. v. Kittle*, 2 Fed. 713 (1880); *National Life Ins. Co. v. Harvey*, 7 Fed. 805 (1881); *Miller v. Life Ins. Co. of Virginia*, 24 S. E. 484 (1896).

A fortiori, where the lender is secured against any loss whatever, even of excessive interest, and the contingency is immaterial as regards him, the contract must be held usurious. In *Trust Co. v. McLachlan*, (*supra*), the plaintiff loaned money to the defendant at an excessive rate, upon condition that the debt, principal and interest was to be cancelled by the death of the debtor. Had the contract stopped there it would have been valid; as the whole principal was at stake, the payment being contingent on the continuance of the debtor's life, the chance of losing all makes the possibility of the lender getting too much not illegal. But this contract further stipulated that the lender might take out a policy on the life of the debtor, and thus indemnify itself against loss by his death, the cost of the premiums to the lender being included in the excessive rate of interest charged the debtor. The court said the contract was unique; that it was a scheme to cover usury by the color of a contingency, where none really existed. The contract was therefore held void. In the later case of *Missouri, &c., Trust Co. v. Krumseig*, (*supra*), where the facts were exactly similar, the court said a bill in equity would lie to cancel a mortgage made under such a contract, and, under the Minnesota Statute, without the payment of lawful interest, the parties not being *in pari delicto*.

If we apply the test of usury to such a contract, we see that these decisions are clearly right. The plaintiff had nothing at stake under the contingency; if the debtor lived, he received the excessive interest, and his principal was secure; if the debtor died, he received the equivalent to the principal and excessive interest, by means of the insurance policy. There was no risk, and the contract was therefore usurious.

PRACTICE OF MEDICINE ; MISDEMEANOR ; EX POST FACTO LAWS. *People v. Hawker*, 46 N. E. Rep. 607. The extension of the constitutional doctrine of the police power of the states has apparently reached such a point that the individual rights of citizens can be seriously infringed upon in a *bona fide* exercise of that power. At least such is the decision in the recent case of *People v. Hawker*, 46 N. E. Rep. 607 N. Y. (1897). The defendant had been convicted under a statute declaring guilty of a misdemeanor any person who, after conviction of a felony, should practice medicine, the felony in this case having been committed before the passage of an act prescribing the qualifications for the practice of medicine, prohibiting any one from practising who had ever been convicted of a felony. The defense was that the statute was prospective in its application, or if it was not prospective, it was null and void as being in violation of the Constitution of the United States, forbidding the state to pass any *ex post facto* laws. The conviction was sustained, two judges concurring solely on the ground that the record did not show that the defendant had ever been a physician. Two judges dissented. The only serious contention involved in the case, was that the law was *ex post facto*. An *ex post facto* law is one that punishes as a crime an act done before its passage and which, when committed, was not punishable ; an act that aggravates a crime or inflicts a greater punishment than the law annexed to it when committed ; or a law which alters the rule of evidence so as to convict an offender. C. J. Chase, in *Calder v. Bull*, 3 Wall. 386. It was argued that, while the statute did not directly enlarge the punishment for the felony of which the defendant had been committed, it did deprive him of his rights of property, of the right to earn his living by the practice of medicine, and that in this way the punishment was aggravated. The court said the difficulty with that contention was, that the record did not show that the defendant had ever been a physician, and that no presumption could be indulged in to that effect. The court then went on to show that the exercise of the police power for the preservation of public health made necessary the subordination of the rights secured to the individual by the constitutional provision, that no person should be deprived of life, liberty or property without due process of law. Illustrating the thought, the court said, "the property of a citizen may be seized and burned if, in the judgment of physicians, it is infected and liable to cause the spread of contagious disease. He may be certified into an insane asylum or carted away into a pest-house and there restrained and imprisoned if, in the judgment of the physician, such a restraint is advisable." Continuing the same line of reasoning, the court said, "a state, in the exercise of its police power, might impose reasonable conditions under which individuals might practice medicine—that a provision that such individuals must be of good moral character was only reasonable—that the defendant having been convicted of felony the presumption of bad character attached to him, and that, therefore, this state statute deprived him of no rights secured by the

constitution, it not appearing that he had previously been a registered physician." Whether the decision would have been different if such had appeared is interesting to consider. Two of the judges concurring expressly on the ground that that feature did not present itself, while O'Brien, J., in a brief dissent, sums up his conclusion as follows: "The statute in question punishes the defendant for an offence committed twenty-five years ago, and of which he was then convicted and for which he was punished. The statute plainly inflicts an additional punishment, and is in conflict with the constitution." This case serves as an interesting illustration of what is apparently the true rule, that individual rights must, to a certain limit, bow before a legitimate exercise of the police power, having in view the interest of the public, *bona fide* designed to that end. It is to be hoped a final authoritative judgment will be arrived at by an appeal to the United States Supreme Court.

WILLS; DESIGNATION OF DEVISEES. *In Conway's Est.*, 181 Pa. 156 (May 3, 1897), a novel question was presented. The testator gave his residuary estate to his "spinster or unmarried nieces." Six of his nieces had never been married, two had been married and were widows; all were actually unmarried at the time of testator's death. The only cases brought to the court's attention were those which hold that the word "unmarried" ordinarily means "never having been married:" *Dalrymple v. Hall*, L. R. 16, Ch. D. 715 (1881); but that such meaning can be shown not to have been intended by reference to the context: *Mertens v. Waller*, L. R. 26 Ch. D. 575 (1883); *In re Leshingham's Trusts*, L. R. 24 Ch. D. 703 (1883). In the case under discussion the context furnished no clue as to testator's intention.

The court's decision was as follows: "The word 'or' must have been used either in connecting the word 'spinster' with a word he (testator) supposed to be its equivalent, by way of explanation, or conjunctively, in the sense of 'and.' If we assume that he used it in the former of these senses, then he was mistaken in the use of the word he selected to furnish an explanation of the word 'spinster,' and has failed in his effort to make his own purpose clear. If, on the other hand, we assume that he used the word conjunctively, then all his nieces become participants in his bounty in equal shares. The spinsters and the widows stood in the same relation to the testator; their actual condition was that of single or unmarried women; and no reason for discriminating between them appears in the will or in the circumstances presented by the case. This construction relieves the testator from the charge of mistake in his efforts to express his intention, from an arbitrary discrimination between those standing in the same degree of relationship to him, and works equality in the distribution of his estate."

BOOK REVIEWS.

THE TRUE DOCTRINE OF ULTRA VIRES. By REUBEN A. REESE, Esq., of the Colorado Bar. Chicago: T. H. Flood & Co. 1897.

There have been of late years numerous treatises on special branches and doctrines of the law, but until Mr. Reese's little volume appeared no American had written a book on the doctrine of *ultra vires*. Largely owing to the contradictory positions assumed by the courts, and the illogical results often reached, the subject is not altogether easy of brief, orderly and clear treatment, especially when it is separated from the general law of corporations. Mr. Reese is, therefore, doubtless entitled to the lenient judgment of his readers.

In a little over three hundred pages of text, the writer considers the application of the doctrine to the powers of private, quasi-public and municipal corporations. "The True Doctrine of *Ultra Vires*," it appears, is the "special capacities" doctrine, which regards the corporation as restricted to the business and the mode of its exercise indicated in its charter or the laws of its creation, and as possessing no power beyond those conferred. All *ultra vires* acts, he believes, should be regarded as absolutely void and of no effect. He attacks with force the illogical position of those courts which, while nominally adhering to the *special capacities* doctrine, and declaring *ultra vires* contracts to be void, nevertheless, when they are executed permit a recovery upon the contract. The large number of cases marshalled to the support of the writer's various propositions indicates extensive research. A few important cases have been omitted, however, *e. g.*, *Wright v. Pipe Line Co.*, 101 Pa. 204 (1882); *Insurance Co. v. McClelland*, 9 Colo. 11 (1885); *Slater Woolen Co. v. Lamb*, 143 Mass. 420 (1887); *Bath Gas Light Co. v. Claffy et al*, 45 N. E. 390 (1896).

The view, which seems to be gaining ground, that a contract, though *ultra vires* should be treated as enforceable *inter partes*, the state exacting the proper penalty from the corporation, is not considered by Mr. Reese, except by inference in advocating a strict adherence to the doctrine of *special capacities*. A feature of the book is a chronological review of the doctrine as illustrated by the cases. A number of the leading cases are synopsized and commented on. The synopses, while apparently generally accurate, are not in all instances quite as exact as one might wish. For instance, in the summary of *Pearce v. Railroad*, 21 How. 441 (1858), no reference is made to the fact that the note sued on was in the hands of a holder in good faith and for value, and that in the opinion of the Supreme Court of the United States not even the

importance of free circulation of commercial paper justified a recovery on a note issued in payment of an *ultra vires* obligation, though in the next case but one: *Monument National Bank v. Globe Works*, 101 Mass. 57 (1869), the circumstance that a recovery was permitted on a note given in excess of the powers of the corporation and in the hands of an innocent purchaser for value, is the only fact stated.

It is at least open to question whether apologetic matter, particularly when it has reference to style, should not be avoided. According to the preface, "In style and composition neither classical precision, stilted phraseology, nor laborious effort at 'fine writing' has been attempted." (Observing incidentally that few legal writers err on the side of precision, the presence of such paragraphs as the following raises a doubt as to whether the author has quite realized his aim of stylistic simplicity. "This uncertainty and confusion [in construing corporate charters], however, has not arisen, it is respectfully submitted, by reason of any misapprehension of the correct construction which should be placed upon the doctrine, but rather from a growing tendency of the courts of this country, a spreading of the granger element in our state courts—to disregard purely legal rights and the rules of law controlling them, unwisely tempering their questionable judgments with even more questionable and unstrained mercy, and basing their findings upon the equitable rights of the parties, whatever may be the cause of action, as they appear to the particular court having jurisdiction of the subject-matter, the application of the doctrine being dependent, in a great measure, upon the temperament and discretion of the judge before whom the defence of *ultra vires* is urged. While the manner of adjusting legal complications may be commendable in a certain sense, it cannot be regarded as judicial wisdom by those who desire the fountains of legal jurisprudence maintained in all their positive purity and vigor, undefiled by the wanton influence of class prejudice, or the natural flow thereof diverged by the misguided inspiration of political zeal." *Walter C. Douglas, Jr.*

BOOKS RECEIVED.

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TREATISES.

COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, HISTORICAL AND JURIDICAL. By ROGER FOSTER. Three Volumes. Vol. I. Boston: The Boston Book Co. 1895.

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DOMESDAY BOOK AND BEYOND. THREE HRAVS IN THE EARLY HISTORY OF ENGLAND. By FREDERIC WILLIAM MAITLAND, LL.D., Downing Professor of the Laws of England in the University of Cambridge, of Lincoln's Inn, Barrister-at-law. Boston: Little, Brown & Co. 1897.

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A TREATISE ON THE AMERICAN LAW OF GUARDIANSHIP OF MINORS AND PERSONS OF UNSOUND MIND. By J. G. WERNER, author of American Laws of Administration. Boston: Little, Brown & Co. 1897.

PROBATE REPORTS ANNOTATED. Containing recent cases of general value, decided in the courts of the several States on points of probate law. By FRANK S. RICE, author of American Probate Law and Civil and Criminal Evidence. Vol. I. New York: Baker, Voorhis & Co. 1897.

A SELECTION OF CASES ON DOMESTIC RELATIONS AND THE LAW OF PERSONS. By EDWIN H. WOODRUFF, Professor of Law in Cornell University. New York: Baker, Voorhis & Co. 1897.

A TREATISE ON THE CRIMINAL LAW, as now administered in the United States. By EMLEN McLAIN, A. M., LL.D., Chancellor of the Law Department of State University of Iowa. Two Vols. Chicago: Callaghan & Co. 1897.

THE AMERICAN LAW REGISTER AND REVIEW.

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No. 7.

THE LAW OF LABOR AND TRADE.*

"The right to labor is a necessary consequence of the right to live"
and "the freedom of contract is inviolable."

I construe the law, gentlemen, requiring your President to address you "with particular reference to any statutory changes in the state of public interest and any needed changes suggested by judicial decisions during the year" as meaning in its broadest interpretation that it is your wish to have submitted for your consideration, the most important and farthest reaching changes, or proposed changes in jurisprudence not necessarily local in their origin or progress, if so it be that we need the benefits of, or should be protected against the dangers in legislation of other states, springing from a great tendency or movement affecting or likely to affect us.

Without, therefore, attempting by preliminary remarks to persuade you of the aptness of a discussion of the law of labor and trade at this particular time, it is my purpose to touch upon the history of legislation relating to these subjects, but more especially to bring to your attention some specimens of recent enactments affecting them, that they may be examined

* Address by P. C. Knox, Esq., President, to the members of the Pennsylvania Bar Association.

in the light of the underlying principles of our government, and the economic laws they are designed to control.

Now that the defense of life and individual freedom is no longer the chief care of civilized men, it may be said that among the main purposes of all existing social compacts are the production, preservation and distribution of wealth. This is true whether the organization be a commune or the more common form of social agreement where the individual is permitted to work out his own ends according to his own capacity and fancy.

The right to labor for the production of property is unquestioned. It has been well said to be "a necessary consequence of the right to live." This right is the same whether the purpose be to produce or acquire only sufficient for maintenance or to accumulate a surplus beyond the individual's needs.

The right to the property thus acquired is protected in all governments to the acquirer and to those to whom he may convey or transmit it by sale, gift or devise. This right was the first concession by tyranny to progressing humanity and was only yielded after a struggle of centuries. The right to acquire property and to possess it are, therefore, the same in their nature, and are both included by economists under the general term "Right of property." It is thus expressed by Say in his work on Political Economy, Sec. 133: "The right of property is equally invaded by obstructing the free employment of the means of production as by violently depriving the proprietor of the product."

A means of acquiring property or wealth besides labor is by exchange or sale. These rights are equally fundamental, and are included in the right of property as above defined. Such transactions in property are effected through contracts between individuals, and contracts, which are the expression of the terms upon which individuals deal with property or the means of producing it, have, in all forms of government, been the subjects of the greatest consideration. "The liberty of contract is one of the inalienable rights of the citizen."

These regulative social and economic principles find ex-

pression in one form or another, or are recognized in all constitutional governments. They are all included in the Declaration of Rights in the words, "All men are born equal, free and independent and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

The rights to acquire, possess and protect property are inherent and indefeasible. As there is no difference between the nature of the right to acquire and the right to possess property, so there is no degree of preference expressed for the one right above the other in this great declaration of their nature and legal status. Neither is there any distinction or preference shown as between the means of acquisition, whether by physical, mental or commercial activities.

We approach, therefore, the legislation affecting the rights to acquire, possess and protect property, with the certainty that by the fundamental law they are inherent and indefeasible in all men. "This equality of right," said Mr. Justice Field, "with exemption of all disparaging and partial enactments, in the lawful pursuits of life throughout the whole country, is the distinguishing privilege of the citizens of the United States." The Constitution of the United States provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and further that "no person shall be deprived of life, liberty or property without due process of law."

Legislation affecting the right to acquire property began early in the English speaking world. It was at some periods aimed at and undertook to regulate its acquisition by labor, through statutes affecting labor; at other times at its acquisition through trade, by statutes regulating trade and commerce. At times these laws bore harshly and unjustly upon the one, again upon the other.

The world has seen four great epochs in labor.

First, the struggle for individual emancipation from serfdom and slavery.

Next, the period of the guilds or monopolies of labor, whose unique and far reaching oppressions made the demand of the masses of Europe for free labor a potent factor in the readjustment of governmental and social conditions during the past two centuries. Labor is entitled to the credit of its own original emancipation, and to the odium of its self-imposed tyranny existing in the two periods suggested.

Again, we have the period of statutory oppression, followed by the existing era of legislative favor.

From slavery labor became a tyrant; thence it sank into oppression, again to rise to its present status.

The first Act of Parliament known as the Statute of Laborers is the Statute of 23 Edward III. By its terms every man and woman under threescore having no occupation was required to serve in a suitable station for the wages and upon the terms usual in the preceding five or six years. Severe penalties were provided for non-compliance. Later, prices were fixed by Parliament for a day's work for agricultural labor and certain artifices. The penalty for abstention from service under this Act was to be branded with a hot iron upon the forehead with a letter "F" to denote falsity.

This statutory enslavement of the skilled and unskilled labor of England in the fourteenth century was followed down to the present century by penal acts preventing agreements for advancing wages or lessening the usual hours of work. It was also highly penal to endeavor by any means to try to prevent any unemployed person from taking service, or to try to induce any person to leave his work or to refuse to work with any other workmen or to assist men upon a strike or to collect money or attend meetings having any such purpose in view.

Thus, with slight modifications, the law stood until 1824 and 1825, when the Statutes of England were purged of these harsh and unjust provisions and the course of judicial decision upon the law of conspiracy was changed by enactments that in effect legalized all that had theretofore been prohibited except when accomplished by violence, threats or intimidation, molestation or obstruction.

The different States of this Union have met and in many

instances further extended the liberty and privileges of associated labor. In Pennsylvania, trades unions may be chartered to do substantially all that was inhibited by the English Statutes and by common law as it was expounded in this Commonwealth, and Congress has provided for the incorporation of trades unions for many purposes criminal at common law.

In Pennsylvania, the Act of June 14, 1872, provides that it shall be lawful for any laborer or laborers, acting either as individuals or as the member of any association, to refuse to work for any person whenever in his, her or their opinion the wages paid are insufficient or the treatment of such laborer or laborers is brutal or offensive, or the continued labor by such laborer or laborers would be contrary to the rules of any organization to which he or they might belong, without subjecting any person or persons so refusing to work to prosecution for conspiracy. To this act there is a provision reserving liability to prosecution to those who shall in any way hinder persons who desire to labor or who shall hinder other persons from being employed as laborers. The Legislature, however, in 1876, construed this proviso by enacting that the use of force, threat or menace of harm to persons or property shall alone be regarded as in any way hindering persons who desire to labor, or other persons being employed as laborers.

So that as the law now stands in this great industrial State, and it is by no means an extreme illustration of American legislative attitude towards labor, a man may work when he pleases, for whom he pleases and for what he pleases. He may lawfully refuse for any reason to continue his labor, whether the reason be one based upon his own grievance or be predicated upon some rule of an association. He may do anything he chooses by himself or in conjunction with his associates to advance the price of labor, to restrict its hours, to prevent others from working for his employer or to prevent others from being employed, provided he does not use force, threat or menace of harm to persons or property, without being subject to prosecution or indictment for conspiracy under the criminal laws.

Thus we see the right to acquire property by labor is free,

absolutely free. Indeed, more than free, as in addition to the freedom of the individual the law provides for the association of numbers and legalizes their co-operation for purposes formerly illegal. Nay more, in Pennsylvania, in respect to corporations, which are the great employers of labor, by the Act of June 4, 1897, it is made a misdemeanor punishable by fine and imprisonment to coerce by discharging a workman from service because of his connection with any lawful labor organization, or to exact from any applicant for employment any promise not to form, join or belong to such lawful labor organization, or to attempt by any means whatsoever to interfere with the laborer's free and untrammelled connection therewith.

The right to trade means the right to contract. The simplest as well as the most complicated engagements between men are contractual. The liberty which enables a man to dispose of his own services upon his own terms is but the liberty of contract. The right to dispose of one's own surplus to acquire the surplus of another, or to supply the necessities or requirements of others, is but the right of contract. Any restriction placed upon this right is a restriction upon the liberty of contract, which is an inalienable right, being included in the right to acquire and possess property.

The right to trade has been at times more or less trammelled for the good or supposed good of the public. As in the case of labor, it was in England subject to many Parliamentary regulations and restrictions.

The attempt to regulate the trade and commerce of England by artificial rules contained in Acts of Parliament led to many curious and ridiculous consequences before it was abandoned. The spirit of commerce could not thus be confined. The desperate attempts of Parliament to keep the business of the kingdom within the lines and subject to the regulations imposed by that authority led from one encroachment to another upon the freedom of the people and culminated in the sumptuary regulations enacted in the reign of Edward III, which prescribed even the dress and diet of his subjects.

As in the case of labor, so in respect to the price of com-

modities, it was fixed in utter defiance of the law of supply and demand or the cost of production. Contracts for the sale or exchange of goods were forbidden, except at the staples or market places fixed by law, and there only under imposed conditions. The system of special privileges soon came into existence. The more powerful merchants and manufacturers were enabled to purchase or otherwise secure exemption from the general rules, and in the end exclusive rights were granted. Thus monopolies came into existence. The sale of grants of monopoly was a speedy and certain method of raising revenue for the crown. Traffic therein soon overleaped the limits of the necessity for revenue, and was maintained to feed the avarice of the sovereign and his court. The most odious form of commercial or industrial enterprise is a monopoly. A monopoly is defined by Lord Coke to be "an institution or allowance by the King by his grant, commission, or otherwise, to person or persons, bodies political or corporate, of or for the sole buying, selling, making, working or using of anything whereby any person or persons, bodies politic or corporate are sought to be restrained of any freedom of liberty they had before, or hindered in their lawful trade:" 7 Bacon's Abridgment, 22.

And by the Supreme Court of the United States as, "the withdrawing of that which is a common right from the community and vesting it in one or more individuals, to the exclusion of all others:" *Charles River Bridge Case*, 11 Peters, 567.

Monopolies can only exist by grant from the sovereign. They cannot be created by contract between individuals. During the period that the labor guilds and corporations so effectually destroyed the freedom of labor, monopolies flourished to the destruction of all competing trade. The validity of monopolistic grants during and prior to the reign of Elizabeth was successfully contested in *Darcy v. Allen*, in 1601, and in 1624, Parliament declared them null and void.

Sir John Culpepper said of the monopolies of England, "Like the frogs of Egypt they have gotten possession of our dwellings, and we have scarce a room free from them.

They sup in our cup; they dip in our dish; they sit by our fires. We find them in the dye vat, wash bowl and powdering tub. They share with the butler in his box. They will not bait us a pin. We may not buy our clothes without their brokerage. These are the leeches that have sucked the commonwealth so hard that it is almost hectical."

Detestation of a monopoly is ingrained in the Anglo-Saxon. "They have always been harlots in the courts, going in at one door to be cast out at another." They are contrary to the spirit of free governments, and have been held to infringe the rights of the people under the Constitutions of many States. To this sentiment must be attributed the hostility now so pronounced against many of the great commercial and industrial enterprises of the country which possess or are alleged to possess the features of a monopoly, that has found expression in the legislation of Congress and of many of the States. The general features of this legislation are substantially the same. In the main they are acts having in view two purposes:

1. To make void as against public policy, contracts establishing monopolies or which may tend to establish them.
2. To make void all contracts which do or may restrain trade or prevent competition.

Fines and imprisonments are provided for those offending by being parties to such contracts, and in portions of the land of the setting sun other features are embodied expressive of a hostility to thrift that takes a form not worthy of serious consideration. As for illustration, the proposed anti-department-store laws designed to prevent merchants from offering for sale more than a limited number of kinds of articles, to the utter extinction of the useful and convenient shopkeepers who have succeeded their pilgrim prototype who supplied his customers, according to his alliterative sign-board, with

"TESTAMENTS, TAR AND TREACLE,
GODLY BOOKS AND GINLETS."

The New York statute may be taken as a type. It contains all of the features of the Act of Congress recently construed by the Supreme Court of the United States, with such

additions as bring it fully up to the most radical and advanced thought upon the subject evidenced in the acts passed or introduced in nearly all the States, including our own. Its title and first two sections are as follows :

"AN ACT

"To prevent monopolies in articles or commodities of common use, and to prohibit restraints of trade and commerce, providing penalties for violations of the provisions of this act, and procedure to enable the attorney-general to secure testimony in relation thereto.

"The People of the State of New York, represented in Senate and Assembly, do enact as follows :—

"Section 1. Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production, or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby trade or commerce in this state in any such article or commodity is or may be restricted, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit of any lawful business, trade or occupation is, or may be, restricted or prevented, is hereby declared to be against public policy, illegal and void.

"Sec. 2. Every person or corporation, or any officer or agent thereof, who shall make or attempt to make or enter into any such contract, agreement, arrangement or combination, or who within this state shall do any act pursuant thereto, or in, towards or for the consummation thereof, wherever the same may have been made, is guilty of a misdemeanor, and on conviction thereof shall, if a natural person be punished by a fine not exceeding five thousand dollars, or by imprisonment for not longer than one year, or by both such fine and imprisonment; and if a corporation, by a fine not exceeding five thousand dollars."

THE LAW OF LABOR AND TRADE.

contracts creating monopolies and all contracts in restraint of trade are the targets. Between these there are many degrees of resemblance and some of striking and radical difference. While a valid monopoly always restrains trade, in fact, it hampers competition, a contract between individuals can never create a monopoly.

Legislation against monopolies, except in so far as it may repeal existing grants, amounts to nothing, as there can be no pretense of exclusive right to pursue any trade or call without legislative grant. The sovereign power need not forbid, it need only refrain from creating to prevent any claim of monopoly arising. Two or more persons, whether natural or artificial, combining their labor, skill or capital in the prosecution of any work or trade, cannot create a monopoly whatever the terms of their combination may be. It is only their power to place limitations upon their own acts. They neither contract nor expand the rights of others in respect to a similar business. Statutes, in so far as they make it a penal offence to make contracts creating monopolies, undertake to punish an impossible act. The statute quoted is illegal and void every contract whereby a monopoly in the production, manufacture or sale of any article in common use is or may be created and provides for the punishment, by fine and imprisonment, of the parties thereto. By what process any two or more persons in the State of New York, by contract or combination could create a monopoly, is hard to understand, if it be true that a monopoly can only be created by grant from the sovereign, and "it is the withdrawing of which is a common right from the community and vesting it in one or more individuals to the exclusion of all others," as above defined. Such legislation, so far as it strikes contracts creating monopolies, is meaningless, confusing and unnecessary.

The interesting, important and serious question raised by such legislation and the one after all that underlies all such legislation is this, can the legislature forbid and invalidate all contracts which are or may be in restraint of trade, or restrictive of competition?

The liberty of contract which is said to be an inalienable right and guaranteed to the citizens by authority beyond legislative control is nevertheless subject to certain limitations. Contracts to do an unlawful act, or to do a lawful act in an unlawful way, are criminal and void. Contracts that are against public policy are prohibited in this sense, that they cannot be enforced. It is interesting to note that this is the only sense in which they are prohibited. It was never supposed that A. and B. could not make any commercial or business agreement they saw fit and carry it out according to its terms, even though the public would be benefited by their not doing so. If A. voluntarily, with or without consideration, agrees with B. not to carry on a competitive trade, the courts could not compel him to do so or prevent B., by any process, from conducting his business under the more favorable conditions thereby secured. If such a contract were unreasonable, without consideration, or injuriously affected the public, the courts would refuse to enforce its provisions against one of the non-complying parties upon the ground of public policy. This would not strictly be an interference with the liberty of contract between persons *sui juris* and dealing with their own, but a refusal by the public to lend the machinery of the law maintained at the public expense, to enforce an agreement that affected injuriously the public interests. This is a sound public policy and it is the utmost extent to which the liberty of contract has heretofore been adversely affected. It will be observed the legislation under discussion is not upon these lines. It is not an attempt to establish a new public policy for the guidance of the courts broad enough to deny a remedy to a different class of cases from that now excluded. It makes the contracts themselves illegal and void, vests the courts with jurisdiction to restrain their operation, and punishes the parties. It is the legislators saying, inasmuch as, in our opinion, it would be better for the public at large that both A. and B. should continue to prosecute their callings or trades in competition with each other, although perhaps to their disadvantage, we will force them to continue to do so by denying them the power to

negotiate a sale, combination or consolidation upon the only terms such an arrangement could be made, to wit, by the vending or absorbed party covenanting to refrain from engaging in a similar employment, and we enforce our will not by denying them a forum for the enforcement of such a contract, but by furnishing a prison for the fact of its existence. This is certainly radical and new.

Is there not a distinction between the power of the legislature, assuming it to have such power, to declare a contract void as against public policy, thereby barring the courts from its enforcement, and legislative power to make the execution of such a contract a crime?

But does the legislature have power to declare illegal *all* contracts in restraint of trade, even to the extent of closing the courts against them?

No one has yet defined, so far as I have been able to discover, the term "in restraint of trade" in such a way as to give to it that certainty essential to a clear understanding of a written law. There has been little concern heretofore about a precise definition, as in administrative justice the validity of the contract has usually turned upon its consideration, its reasonableness, the situation of the parties and the interests of the public. Now, however, in view of these acts declaring *all* contracts in restraint of trade criminal and void and the decision of the highest court in the land that neither reasonableness, consideration nor the necessities of the parties are elements to remove any contract from that classification, it becomes vital to know exactly what the words, in restraint of trade, import.

We know of that endless list of contracts that have been the subjects of contention in the cases in which the principles of the application of the rules of public policy to contracts in restraint of trade have been settled. In most, if not all of these the fact that the agreements were in restraint of trade was conceded and the validity of the contract contended for, nevertheless, upon one or another of the above grounds. The Supreme Court of the United States states the rule of guidance to be this,—when it is claimed that a

Contract in restraint of trade is void,—“Public welfare first considered, and if it be not involved and the restraint upon one party is not greater than protection to other party requires, the contract may be sustained. Question is whether under the particular circumstances the case, and the nature of the particular contract involved in it, the contract is or is not reasonable.” *Gibbs v. Beavercreek Gas Co.*, 130 U. S. 397. This case does not define contract in restraint of trade; it merely tells us when such contract is lawful.

Nester v. Brewing Co., 161 Pa. 473, decides that a contract designed solely to prevent all competition among the parties in restraint of trade, is against public policy, and will not be enforced, but this throws no light upon what constitutes restraint or what is the meaning of trade.

Assuming the word “restraint” is to be taken in its usual meaning, what is this trade that is the ward of public policy and is to be subjected to no restraint? Is it a fitful human mouth course of dealing subject to no law but sentiment in which profits are to be reaped under the protection of a special laws of local application? Or is it a great system of production, sale, and exchange growing out of the wants and necessities of humanity and governed by laws as inexorable as those of nature, and equally incapable of being restrained or diverted from affecting any country or state? Will it be a sentence to an indictment for being a party to a contract in restraint of trade that in fact the contract does not restrain trade, although it restricts competition, but upon the contrary promotes trade by preserving it where it would otherwise perish? And is this a question of law or fact, and upon what kind of evidence is it to be determined? American manufacturers are undersold in the markets of the world by their foreign competitors, does it restrain trade for them to combine to effect economies beyond the individual means and to confirm their agreement to do so in unison by covenants in partial restraint of trade, when not to do so means bankruptcy, idleness, and loss to the community? If a number of workmen combine to raise the

wages, secure more reasonable hours, or to correct a real or fancied abuse, and agree to attain their ends by refusing to work until they are conceded, are they shielded by the statutes declaring these purposes to be legal and exempting them from prosecution in view of a subsequent law making all combinations in restraint of trade criminal? These are all material questions, as lawyers well know, and laymen are soon to discover.

Without undertaking to define restraint of trade, I think it safe to say all those contracts are included in this legislation as crimes and void which have been treated as in restraint of trade in the adjudicated cases and have only been saved in the courts because of the character and extent of the consideration, the necessities of the parties, their reasonableness, under the particular circumstances or some previous statutory exemption that may now fall by repeal.

It would require the space of a volume to enumerate the business contracts that have, though concededly in restraint of trade, been sustained by the courts. Illustrations at once occur to the professional mind. The case of a sale of a business and its good will is a common one. Here a covenant upon the part of the vendor not to engage in competition with his vendee in a similar business is often the main consideration for the transaction. This is, of course, in restraint of trade, and interferes with competition. But to make a contract such as this illegal is not only restrictive of the liberty of contract, but it is depriving one of his property without due process of law. Good-will is property capable of being appraised, bought and sold. In many cases and especially in the lines of business intended to be most affected by this new legislation, it is the main ingredient of value. It represents all the struggle, industry, tact and judgment that makes success. In estimating the worth of a business it is not infrequently reckoned more valuable than the buildings and machinery that make up the physical plant.

In the Store Order Cases, the Supreme Court of Pennsylvania says:

"The legislature cannot prevent persons who are *sui juris*

from making their own contracts : " *Godcharles & Co. v. Weigman*, 113 Pa., 431.

In *Commonwealth v. Perry*, the Supreme Court of Massachusetts says :

" The right to acquire, possess and protect property includes the right to make reasonable contracts, which shall be ' under the protection of the law.' "

That is just what this legislation attempts to prevent. All contracts, reasonable or unreasonable, upon good consideration or upon none, necessary or unnecessary for the real interests of the parties, all are alike forbidden if they in any way or to any extent restrain trade or have that tendency. The Supreme Court of the United States so construed the Anti-Trust Act of 1890. The language of the opinion is this:—" When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the Act that which has been omitted by Congress: " *United States v. Trans-Missouri Frit. Assn.*, 17 Supreme Ct. Rep. 540 (Mar. 22, 1897). This, of course, includes combinations among workmen as well, if they in any way restrain trade. No matter how peaceable, orderly, just and reasonable the combination may be ; no matter what oppressive injustice or harshness it may be designed to correct. If it restrains trade (and all such combinations do restrain trade for without that effect they would be impotent) it is a crime. This was specifically determined in *United States v. Debs*.

If it could be successfully contended in view of the legislation declaring trades unions lawful and exempting their members from criminal prosecution for combining in restraint of trade that they would thereby not be included within the terms of these new laws, then, when it is remembered that among the purposes for which labor organizations may exist, are the advancement of wages, the regulation of the service,

the shortening of hours, the maintenance of their own rules, the prevention of others from taking employment by means other than force, it requires but a moment's consideration to suggest the sharp contrast between such legislation and that which renders criminal and void similar co-operation between the traders and commercial classes of the country. The law would then be this: A combination that raises the price of goods is *void*, and the combiners are punished as criminals because of a public policy declared by statute. A combination to raise the cost of production of the goods by forcing an increase in wages or a diminution of service is *valid* because of a public policy declared by statute. As the effect upon the public is the same, to wit, an increase in the price, it is difficult to discover the underlying reason for the legislative pronouncement that one is contrary to public policy while the other is in accord.

Under general language of prohibition upon all contracts that do or may restrain trade or upon combinations that have for their purpose or may effect an increase or decrease in the price of commodities in general use, it will require a fine discrimination to fasten the inhibition upon employers and discover immunity for the employees because of previous favorable legislation. Four Justices of the Supreme Court of the United States concur in this statement. "The interpretation of the statute (The Anti-Trust Act of 1890) which holds that reasonable agreements are within its purview, makes it embrace every peaceable organization or combination of the laborer to benefit his condition, either by obtaining an increase of wages or diminution of the hours of labor."

A corporation employer in Pennsylvania engaged in interstate trade finds himself in this peculiar position: He goes to prison if he himself enters into a reasonable contract in restraint of trade. He goes to prison under the Act of 1897 if he induces his employee not to do so. The employee in turn is thus situated: He may prosecute his employer for interfering with his connection with a labor organization, and will himself be prosecuted if he joins one existing for either of the above laudable purposes. The situation as to domestic

trade will be the same should the pending Anti-Trust Act become a law.

There is a well defined policy of the law to omit to classify as crimes many agreements and combinations that it will not undertake to enforce. This is found in the decisions of the courts; also in statutes. While by statute agreements to raise or lower the price of wages and to regulate the hours of labor are no longer punishable, they are not enforceable at law. The courts will not undertake to compel contributions for the maintenance of a strike nor enforce penalties among combinations of employers who operate or refuse to operate their works against the terms of an agreement. Unless every act of our daily lives is to be regulated by the wisdom of our law makers, it must necessarily be that we may do or omit to do many things of which the courts will take no cognizance, yet for which we may not be punished.

The argument tending to uphold the constitutionality of an act making an agreement to restrain trade a crime is given by Lord Esher in his dissenting opinion in the case of the *Hoghl Steamship Co. v. McGregor*, 23 Law Reports, Queen's Bench Division, page 605, and it is this: "Agreements held to be illegal because in restraint of trade must have been so held not because there was any wrong done to the traders who agreed—for they all agreed what was to be done—but because there was a wrong to the public. The restraining themselves from a free course of trade was held to be a wrong to the public . . . The cases do not determine whether an agreement which is void as between the parties to it because it is in restraint of trade is or is not an indictable offense. But if such an agreement is illegal because it is a wrong to the public, it seems to me impossible to say that it is not indictable. An illegal act which is a wrong against the public welfare seems to have the necessary elements of a crime."

It might be safely conceded that any act having the necessary elements of a crime is a crime at common law, and may be defined as such by statute. Also, that an illegal act which is a wrong against the public welfare has the necessary ele-

ments of a crime. This means when applied to the topic under discussion that the legislature might punish as a misdemeanor the making of that class of contracts in restraint of trade which the courts would not enforce. It means nothing more.

Many things are done and can be done under the protection of constitutional guarantees with impunity that affect specific public interests injuriously. Segregated competition in business is not a plank in our platform of rights, but the liberty of contract, included in the right to acquire and possess property is a main one. It is not nearly so important to foster a fanciful system of free trade in a state as to rear a race of free men. The contract obnoxious to a sound public policy is now invalid. The innocuous one cannot be made so without infringing the liberty of contract. Legislation that is anything more than declaratory of a public policy to which all contracts would otherwise be submissive is in itself in restraint of trade, against public policy, unconstitutional and void.

The constitution not only secures to the citizen freedom of contract, but it also guarantees him a remedy by due course of law. The remedy is denied him in respect to his contract only when it contravenes public policy. The courts have uniformly held the right to make reasonable contracts upon consideration in partial restraint of trade to be within the constitutional guarantees and have uniformly enforced them.

The declaration of what is and what is not public policy is not always or necessarily a legislative function. Congress has only such legislative power as the people have granted to it, and limitations are expressly imposed upon the lawmakers of all States. The rights of life, liberty and property; the rights of conscience; the right of suffrage; trial by jury; freedom of the press to examine the proceedings of any branch of the government; rights of accused; the right to a remedy in the courts—all these and many others declared in the Bill of Rights are removed from governmental interference and are declared to be excepted out of the general powers of government and to be forever inviolate. The interpretation of these written guarantees is a judicial power and duty. The extent to which a right once conceded to be within this classification

is or must be limited, for the public good is also necessarily a judicial function, and therefore it is for the courts alone in the end to declare the public policy effecting such limitation. The Legislature can make no rule of interpretation of the Constitution when it relates to rights declared to be excepted out of its powers.

The legislature may, upon the other hand, in the exercise of that general power of government known as the police power, define a public policy upon all matters falling within its scope. Nothing, however, comes under the police power that is excepted out of the general powers of government. The right of acquiring, possessing and protecting property is so excepted. This includes freedom to contract. This includes freedom to make reasonable contracts in partial restraint of trade, so the courts have said, and the question is closed.

The ultimate proposition, therefore, is this: Any privilege or right declared by the courts to be guaranteed by the Constitution cannot be taken away by the legislature, either by punishing its exercise as a crime or by denial of a remedy in respect thereto, or stated in another form, a judicial interpretation of a guarantee cannot be modified by a legislative act.

I have endeavored to show that the mischief created by contract cannot rise to the evil of a monopoly. At its worst it cannot go beyond temporary or partial restraint of trade and interference with competition. It cannot close the field, and any contract, agreement or combination for that purpose is void in the sense that it cannot be enforced as the law is now declared. Further limitation than this upon the freedom of contract is neither wise nor valid.

If it is true as alleged upon the one hand that there never was a time when the business of the country was so concentrated, it is claimed to be also true upon the other hand that the public has never been so well and cheaply served. As there is no hard and fast rule of public policy, it presents a nice question, either to the legislature which undertakes to declare a policy by statute, or the courts in the exercise of their power to determine one, in which direction the true interests of the public lie.

If we could lawfully adopt by statute the unbending rule

that if competition is or may be restrained or prevented, the contract is illegal, thus denying the right of combination among the weak, how is the great power of individual capital to be contended with? What would have been the condition of labor without the right to combine for lawful purposes? What is to become of trade if methods cannot be changed to meet its ever varying laws?

Combinations of capital are merely the co-operation idea applied to capital so much and justly extolled in the field of labor. Those halcyon days wherein the margins of profits were sufficiently broad to enable all degree of thrift, enterprise and talent to live in a given trade are gone, not to be restored by sentiment or legislation. The course of trade is influenced by the elements, modified by international agreement between and political and social conditions existing in, the most remote countries of the world. The value of a bushel of wheat may depend upon the construction of a railroad in Asia. That of a ton of iron or coal upon the existence of war or peace in Europe.

Self-preservation is the first law. It applies to governments as well as to individuals. In legislation this principle is known as the police power. In jurisprudence its integrity is preserved under the guidance of the rules of a sound public policy. So to use your own as not to injure another's is the essence of the whole matter, and it practically means to use your own so as not to prevent another from making a similar use of his if he cares to do so.

Existing conditions do not present a demand for legislation, but for the enforcement of well established laws and principles adequate to correct all infringements of private or public rights. Combinations, whether of employers or employees, are not essentially bad or essentially good. It is well nigh impossible to legislate in reference to them lawfully or wisely. Even the omnipotent and unrestrained Parliament of England gave up the task as a hopeless one, and whether it be a consequence or a coincidence it is nevertheless the fact that the greatest industrial progress of the world has been accomplished in the period following the repeal of the laws oppressing labor and antedating the laws oppressing trade.

THE ADMINISTRATION OF JUSTICE IN JAPAN.*

PART I.

In various quarters the material has recently been furnished from which we may intelligently form an opinion upon the difficult subject of the title of this paper. What we need is, first, some information as to the methods of justice and notions of law current in the epoch before the Restoration of 1868; and, second, an acquaintance with what has been accomplished during the new régime of the past twenty-five years in the way of reform and systematization. We shall then be in a position to understand the conditions under which justice is now administered in that country. This subject is of more practical importance in international affairs at the present time than the modes of justice of most other nations, because of its bearing on Japan's demand for the abolition of extra-territorial jurisdiction by Western powers within her boundaries. The object of this paper, therefore, will be in particular to present as far as possible the leading considerations which should affect the propriety or impropriety of yielding to that demand, and to set forth the general facts relating to Japan's legal system, past as well as present, which will put it in the power of Western nations to form a well-grounded opinion on the question of restoring Japan's judicial autonomy.

The paper makes, therefore, no pretence at originality. It only presents in connected form what is to be found scattered in various magazines, transactions and newspapers almost inaccessible to the public. These sources, with two exceptions, own the writer of this paper as their author; and he has welcomed this opportunity to bring together these fragments at this time so as to present, in a connected order and to a wider audience, the material for truly estimating the present conditions of law and justice in that much-misunderstood country, the *terra ignota* for jurists, Japan.

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- I. The Law of the Old Régime.
- II. The Present Codes.
- III. The Codes as a Workable System.
- IV. The Future of Extra-territorial Jurisdiction.

I. THE LAW OF THE OLD RÉGIME.

In Puchta's "Outline of the Science of Right" occur the following passages: "The relationships of Rights are the relations of one man to another, and may be called legal relations. But the various human relationships do not enter, in their full extent, into the sphere of Right, because the legal notion of a person rests upon an abstraction and does not embrace the whole being of man. There must, therefore, occur much modification and substraction before we reach the special relations which alone are involved in the idea of a Right. Thus, suppose a man has arisen from a protracted illness, and in order to pay the bill of his physician, to provide for the urgent wants of his family, due to recent incapacity, and to procure the means of beginning business again, he goes to a well-disposed neighbor, whom he has helped in former times, and obtains a loan at the usual rate. How much of all this must we not leave out in order to ascertain the purely jural relation between the parties! Compare with this the case of the rich man who raises capital merely to add to his possessions by a new speculation, and consider the effort of abstraction which is required in order to assimilate the resulting legal relations. And yet the legal relations in these two cases are identical."

For the Anglo-Saxon lawyer, accustomed as no other is to do homage to strict legal principle, as in and for itself the *summum bonum* of law, and to regard legal justice as manifesting itself only in a science of unbending rules, this quotation will indicate better than anything else, the vast gulf that is fixed between his own system and that which was indigenous to Japan. By making generalizations into hard-and-fast rules, by strictly eliminating in individual cases a variety of important moral considerations (much as certain English economists worked out their science with respect only to the

wealth-acquiring motive), the Anglo-Saxons have succeeded in creating a special type of justice. This tendency of theirs is so strong that English Equity, the one great effort to counteract it, has become in the end identical in these respects with the whole system. But there are peoples to whom this type of justice is utterly alien. Even on the Continent this impersonalization (if we may so call it) of justice has never reached such an extreme. For example, the French Civil Code has a "*délai de grâce*" which the court may accord to a debtor whose misfortunes render inequitable the immediate enforcement of a claim in its entirety (though even this has been abandoned in the new Italian Code).

But it is in Japan that we may find the extreme antithesis to the Anglo-Saxon conception of justice. Whether there is or not any practical lesson for us in studying this opposite type, is a question which we need not here take up. However this may be, the chief characteristic of Japanese justice, as distinguished from our own, may be said to be this tendency to consider all the circumstances of individual cases, to confide the relaxation of principles to judicial discretion, to balance the benefits and disadvantages of a given course, not for all time in a fixed rule, but anew in each instance, in short, to make justice personal, not impersonal. It would not be fair to infer from this that the courts of old Japan could have been no better than the tents of an Arab Sheikh, where justice came roughly and speedily, and the good sense of the tribunal was the only measure of equity. On the contrary, there was in Japan a legal system, a body of clear and consistent rules, a collection of statutes and of binding precedents. But whether it be or not a mere mark of primitive legal development, there was always the disposition to take, as Puchta puts it, "the whole being of man" into consideration, to arrange a given dispute in the most expedient way, to sacrifice legal principle to present expediency. This is the first notable characteristic.

The second is that Japanese justice was essentially feudal in its spirit. At every step this quality shows itself. Chiefly affected by it, of course, was the criminal law. The common people necessarily came in for a meagre amount of respect in

the feudal polity, except as wealth-producing instruments, on whose effectiveness the subsistence of the military class depended. They were restricted and punished with a severity characteristic of feudalism everywhere. The features of their status, and the kinds of punishments, were not substantially different from those of European nations at similar stages of social development. On the civil side the result of feudalism was that the dispensing of justice between disputants appeared as a boon from the lord to his suppliant subjects. The first duty of the faithful commoner was not to disturb his lord's peace and waste his own time by becoming involved in a dispute. A litigious community was the worse of evils. An obstinate plaintiff, even with a just cause, might fare in the end not much better than the defendant.

Another consequence of the spirit of feudalism was the discouragement of appeals. Appeals there were, to be sure; but the generally indispensable ground was that of corruption, prejudice or delay on the part of the inferior judge; and it must be confessed that such appeals were dangerous for the poor peasant, for it went hard with him if he did not make out a clear case against the obnoxious judge, and the many difficulties of accomplishing this, rendered such appeals infrequent.

These being two of the noticeable features of Japanese justice, it must be remembered that none the less was there a real legal system in existence, similar in form and history to that wrought out by the Anglo-Saxon. By this is meant a body of legal notions, establishing relationships of right under given circumstances, and applied in systematic fashion by political authorities to disputes brought before the tribunals. These notions were to be found partly in statutes, partly in local customs, and partly in the precedents and practice of the courts. In the latter realm the development of these ideas by reasoning from analogy played as clear, if not as important a part as in Anglo-Saxon jurisprudence. It was, in Japan, the judges themselves who accomplished this development, not, as in some nations, an order of juriconsults or of religious advisers. The precedents were not all in the shape of decisions directly rendered in controversies. There were, first, the

general precedents established by the Supreme Tribunal (*Iryojo-sho*), in council assembled. The decision, however, usually took the shape of a vote upon a proposition submitted by a single judge, who was in doubt and had no precedent to guide him, or wished to change an existing rule; for the chief members were magistrates already exercising an important original jurisdiction of their own. Secondly, judges of equal rank, but separate jurisdiction, often consulted one another on knotty cases, and agreed thereafter to follow a certain rule mutually decided on. Thirdly, a *daimyo* from a distant fief (having independent judicial powers) sometimes consulted one of the chief judges of the Central Government, the Shogunate. Fourthly, the Supreme Tribunal often passed resolutions asking the approval of the Council of State (the controlling ministry who exercised the virtual power in the Shogun's name) for certain rules, deemed to be of special importance, this approval usually following as a matter of course. Finally, there were sundry minor ways in which precedents were added, and legal ideas expanded. The Council of State sometimes consulted the Supreme Tribunal on a point of law; and, what is still more interesting, a merchant was frequently asked to advise the tribunal as to the bearing of a commercial custom. I have said that appeals were discouraged. But these consultations of one judge with another, or of the Supreme Tribunal with one of its members, practically took the place which appeals occupy with us; for where any really doubtful questions arose, a judge was ready enough to seek advice or put the responsibility of decision upon his superiors.

On the whole, then, while it is sometimes difficult to define the exact line at which the system of justice in a people ceases to deserve the name of jurisprudence, and is to be esteemed as merely customary or arbitrary, there can be no doubt that Japan under the old régime belonged to the higher category. Whether its national system, freed from the bond of feudalism, would have shown a capacity for development equal to some in the West, is an attractive question. But the logic of events has established Western laws here too firmly to allow us to expect ever to see an historical solution of it

and our present lack of knowledge makes it impossible as yet to hazard an opinion upon what might have been.

From this attempt to sketch some chief features of indigenous Japanese justice, we may pass to a few details, concerning the judges, courts, and legal methods in general.

The administration of justice was not confided to a separate governmental department (a characteristic of which European States still show strong traces), and an enumeration of the grades of administrative officials would include most of the judicial ones also. It must be noted, too, that we have to deal in reality with a number of petty states, not merely a single judicial system. Feudalism kept the country divided under a number of powerful nobles, and although these were not politically independent of the Shogun, the Viceroy of the Emperor at Yedo, the Shogun was theoretically only *primus inter pares* as regarded every matter on which he did not choose to legislate in the name of the Emperor, and thus the judicial functions of the powerful *daimyo* not friendly to the Shogun (as well, indeed, as of some others) were exercised, for the most part, quite independently. In many matters of inheritance and marriage in noble families, political reasons had induced the Shogun to legislate, and, as we shall see, the Supreme Tribunal of the Shogunate took cognizance of disputes between different federal lords and between vassals owing diverse allegiance. But in ordinary civil and criminal matters there was a practical independence varying in degree according to the influence of the fief. The immediate possessions of the Tokugawa family (in whose line the Shogunate power descended after 1603) embraced a little less than one-third of the national territory; but, as Herr Rudorff has suggested, the indirect influence of their legislation and judiciary must have been great, and one may say, speaking roughly, that Tokugawa jurisprudence was valid as a type for at least one-half the country. The first Tokugawa Shogun, Iyeyasu (1603-1616), and his grandson Iyemitsu (1632-1652) occupy, with reference to the political and legal unification of the country, a position similar to that of William I. and Henry II. in England. But they were never able to

achieve the results which the English monarchs produced, and this lack of thorough union was the most important influence in keeping the feudal spirit everywhere alive. The materials for the study of legal development in the various fiefs still lie hidden in the store-houses of the noble families; and some slight acquaintance with the Tokugawa system is all that is at present attainable. We may be sure, however, that in this portion of the empire Japanese jurisprudence reached its highest development.

After 1650 the Tokugawa Shoguns were, for the most part, *fainéants*, and the real power lay with the Council of State (*Goroju*), the Shogun's advisers. Decrees, ordinances, and regulations emanated from this source, and reference was often made to the Council on judicial matters. But practically the highest judicial tribunal was the Chamber of Decisions (*Hyojo-sho*), finally constituted about 1634. The working members of this Supreme Tribunal were the Town Magistrate of Yedo, the Temple Magistrate, and the Magistrate of Treasury Lawsuits. Each of these in his capacity as a magistrate of original jurisdiction, dealt with special classes of litigation—the Town Magistrate with suits involving merchants of Yedo (practically all Yedo commoners); the Temple Magistrate, with all questions involving the priesthood, chiefly disputes over temple-lands; and the other magistrate with all important controversies over taxes, etc., as well as with difficult cases reported for decision from the provincial officials, whose duties were primarily fiscal. But at stated times the sessions of this court were attended by one of the Council of State, and on other occasions by one of the Censors, rather by way of inspection than as a sharer in the proceedings. The Shogun himself twice a year appeared at the session. The regular sessions occurred thrice a month—on the second, twelfth, and twenty-second days, with continuances, when necessary. Besides the appellate jurisdiction, already mentioned, in case of corrupt decisions or delayed justice, the Supreme Tribunal had original jurisdiction in disputes between subjects of different fiefs, between a subject of an ordinary fief and a subject of the Tokugawa dominions, between Tokugawa sub-

jects belonging to different magisterial jurisdictions, between different *daimyo*, and in cases of treason or of crimes by high officials. But the lines were not strictly drawn, and this enumeration is only substantially correct. So far as concerns the development of the law, the most important organs were this Supreme Chamber, the three magistrates (*Sambugyo*, their usual designation), and the Town Magistrates of a few other chief cities, such as Osaka, Kyoto, Nagasaki, Nara, and Sakai. When the treasures of recorded material, now stored away in these places, are brought to view, and the case-books of the various Tokugawa magistracies, as well as of the officials in the independent fiefs are properly studied, we shall know something complete and accurate in regard to the growth and conditions of law ; but as yet only the outline is distinct.

Out in the country districts all lawsuits came before the reeve, or general administrative officer (*daikwan*, *horibugyo*, etc.; there were various titles). One of these was set over each district, the area being fixed by custom and convenience ; it might contain from fifty to one hundred villages. But at this point we begin to lose sight of anything like systematic jurisprudence. Justice becomes an administrative rather than a judicial matter. The part which precedent and rule play in settling controversies becomes less and less ; and the part of compromise and conciliation increases. When finally the initial stage of a dispute is reached, we find that the surroundings have quite changed. Justice is attained not so much by the aid of the law as by mutual consent. Customs there are, and definite ones ; but they are always applied through arbitration and concession. This feature of the jural life of the nation is not without its parallel among other Oriental peoples ; but I fancy that it is here peculiarly pronounced, and it is worth dwelling upon. I have spoken of the marked disposition to make justice personal, to let many external considerations enter into the settlement of a controversy. The exigencies of mercantile life in towns reduced this disposition to a minimum ; but it attained its greatest influence in the country. But, joined with this, perhaps even more powerful and deeper-rooted

in the character of the people, was the tendency to conciliation, to make everything smooth,—a tendency which is still, I think, the best key to much of the Japanese character. Not to attempt too much refinement of analysis, it may, perhaps, be laid down that a chief quality of that character is not so much a predominance of the emotional nature as the comparative weakness of the will. A consequent disinclination to act, a desire to avoid obstacles, to make things as easy as possible, explain many traits. The fierce determination to do, which Anglo-Saxons know so well, is wanting. The leisurely way of carrying out an undertaking, the shrinking from physical violence,—these seem to point back to the quality I have named.

The result, then, was a universal resort to arbitration and compromise as a primary means of settling disputes. It was, and to a great extent still is, an ingrained principle of the Japanese social system that every dispute should, if by any means possible, be smoothed out by resort to private or public arbitration. The machinery of local government, under the old régime, was employed for this purpose, if friendly mediation failed; but no efforts were to be spared to settle the matter in this way, and in practice the vast majority of disputes were so disposed of.

The principle of arbitration resulted thus. In case of a disagreement between members of a *kumi* (company of five neighbors, into which every town and village was divided), the five heads of families met and endeavored to settle the matter. All minor difficulties were usually ended in this way. A time was appointed for the meeting; food and wine were set out; and there was moderate eating and drinking, just as at a dinner-party. If a settlement failed, or a man repeated his offence frequently, he might be complained of to the next in authority, the chief of companies; or else the neighbors might take matters into their own hands and break off intercourse with him, refusing to recognize him socially. This usually brought him to terms. An appeal to the higher authorities was, as a rule, the practice in larger towns and cities only, where the family unity was somewhat weakened, and not in

the villages, where there was a great dislike to seeking outside coercion, and where few private disagreements went beyond the family or the *kumi*.

A case which could not be settled in this way was regarded as a disreputable one, or as indicating that the person seeking the courts wished to get some advantage by tricks. In arranging for a marriage partner for son or daughter, such families as were in the habit of using this means of redress were studiously avoided. It was a well-known fact that in those districts where the people were fond of resorting to the courts they were generally poor in consequence. The time spent and the money lost reduced the community to poverty. If even the company-chief could not settle the matter, it was laid before the higher officers, the elder and the headman. In fact, the chief village officers might almost be said to form a board of arbitration for the settlement of appeals; for in deciding the case, the headman received the suggestions of the other officers. It was discreditable for a headman not to be able to adjust a case satisfactorily, and he made all possible efforts to do so. In specially difficult matters he might ask the assistance of a neighboring headman. If the headman was unable to settle a case, it was laid before the reeve, who, however, almost invariably first sent it back, with the injunction to settle it by arbitration, putting it this time in the hands of some neighboring headman, preferably one of high reputation for probity and capacity. When a case finally came before the reeve for decision, it passed from the region of arbitration, and became a law-suit. From the reeve it might pass to the higher officials at Yedo. But even when the case finally came to the reeve's court, it was not treated in the strictly legal style familiar to us. The spirit of Japanese justice, as has been said, dictated a broader consideration of the relations of the parties. What the judge aimed at was general equity in each case. There was, of course, an important foundation of customary law and of statutes from which all parties thought as little of departing as we do from the Constitution; but these rules were applied to individual cases with an elasticity depending upon the circumstances.

Each man was supposed in theory to advocate his own cause. Nevertheless, many made a business of acting for others. But the receiving of a fee was clandestine, and ostensibly the service was rendered as a favor.

There were no court fees, before either the headman of the village, the reeve, or the magistrates. There was a large staff of clerks and assistants at every town magistrate's and reeve's office, and also in the Chamber of Judges; and to these skilled permanent officials rather than to the magistrates themselves was owed the systematic and consistent treatment of litigation.

In the towns there was always a well-organized police system. Ordinary watch duty was performed by the townsmen themselves, under regulations arranged at the ward-meetings; while the regular police were attached to the magistrate's office, and their duties were rather those of bailiffs and detectives. In the country this portion of the work, by old custom, was in the hands of one of the outcast classes, called *bantaro*, or watchmen.

As to the extent of the legislation and the jurisprudence of the Tokugawa Shogunate, it would be useless to enter into details. In the rural districts the subject-matter of ordinary legal relations hardly extended beyond land-holding, with the various methods of tenancy, land sales, marriage, inheritance, adoption, mortgages, and a few easements. The development of definite customs was limited to these general subjects. In the commercial communities legal relations were naturally more varied and more complicated. The loaning of money gave rise to a variety of distinctions and refinements, and furnished a great portion of the litigation. Sale, in all its forms, and with its attendant machinery of brokerage and credit, played an equally important part. Agency, Set-off, Carriers, Bills of Exchange, Checks, Commissions, Auctions, Damages, Penalties, Pledges,—these are some of the special topics in the recorded cases. Of course analogies to our own system and to others are plentiful. The form, however, even where the legal result is the same, is often different, the result having been reached by a different road. Thus, there existed the

ordinary transaction of deposit for safe-keeping ; but as money was often so deposited, and the privilege of loaning it was frequently given at the same time, the rule grew up that the depositary was not liable for loss by act of God (their phrase, "calamity of Heaven," ran in curious correspondence with our own), where a *res* was bailed merely for safe-keeping, while if it was money and was lent out by the bailee, under the above privilege, the bailee was responsible for it absolutely. We should have placed this obligation in the category of debts arising from loans ; but circumstances caused the Japanese to work out a similar liability through the machinery of deposit, —just as the Romans also, in the *depositum irregulare*, a similar transaction, worked out the absolute liability of an ordinary borrower of money.

One might cite a volume full of the interesting coincidences and divergences which present themselves as one studies the Japanese civil law. The purely criminal law does not have the same attraction, for one reason, because it early came under the influence of Chinese law, and never regained its independence ; for another and connected reason, because it came almost entirely from above downwards, and was not an outgrowth of the popular character ; and, finally, because its vitality was almost wholly lost when feudalism fell, and such attraction as it has is connected more with the study of social life under the Tokugawas than with that of legal development. If one were to analyze the reasons for the interest which the civil branch of the law has for the Western student, he would probably find three chief elements. First, the polar oppositeness, as compared with the West, of the style in which Japan has contrived to work out so many traits of language and manners, leads one to wonder whether in legal relations the same spirit of contradiction has shown itself. Second, the idea of justice, as has been said, is in Japan a more flexible one than we are accustomed in Anglo-Saxon law to aim at ; and there must always be an interest in examining and comparing the results reached under these two extreme types of strictness and flexibility. Third, the legal system of Japan (on its civil side) is one of the few which have been permitted by

their environment to maintain their individuality and reach a certain stage of development in comparative isolation from other systems. The Roman was one; the Germanic was another, of which the English branch has attained to the first place. The Hindu, the Slavic, the Mohammedan, and the Chinese may also be named; and to this list it seems clear that the Japanese must be added.

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PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

According to a recent decision of the Circuit Court for the Southern District of California, a suit in a state court cannot be pleaded in abatement of a suit as to the same matter in a federal court; but when a state court has first taken cognizance of a cause of which that court and the federal court have concurrent jurisdiction, the federal court, on motion, will dismiss a suit brought in it as to the same matter, or will suspend proceedings therein until the final action of the state court: *Gamble v. City of San Diego*, 79 Fed. Rep. 487.

Abatement,
Lis Pendens.
State and
Federal
Courts

This rule is by no means as well settled as the court supposes. The cases cited as authority for the ruling are almost all cases in which the state and the federal court did not have the same territorial jurisdiction, and hence came within the settled rule, that a suit pending in a foreign court cannot be pleaded in abatement: *Maule v. Murray*, 7 T. R. 470, 1798; *Wilson v. Ferrand*, 13 L. R. Eq. 362, 1871; *Buchner v. Finley*, 2 Pct. 586, 1829; *Humphreys v. Dawson*, 38 Ala. 199, 1861; *Grider v. Afferson*, 32 Ark. 332, 1877; *Hatch v. Spofford*, 22 Conn. 485, 1853; *McJilton v. Love*, 13 Ill. 486, 1851; *DeArmond v. Bohn*, 12 Ind. 607, 1859; *Davis v. Morton*, 4 Bush. (Ky.), 442, 1868; *Seever v. Clements*, 28 Md. 426, 1867; *Newell v. Newton*, 10 Pick. (Mass.) 470, 1830; *Goodell v. Marshall*, 11 N. H. 88, 1840; *Bonner v. Jey*, 9 Johns. (N. Y.) 221, 1812; *Walsh v. Durkin*, 12 Johns. (N. Y.) 99, 1815; *Lowry v. Hall*, 2 W. & S. (Pa.) 129, 1841; *Smith v. Lathrop*, 44 Pa. 326, 1863; *O'Reilly v. N. Y. & N. E. R. R. Co.*, 16 R. I. 388, 1889; *Drake v. Brander*, 8 Tex. 351, 1852.

But while there is hardly a dissenting voice to the proposition that a suit in a state court outside of the territorial jurisdiction of a federal court is no ground for abating a suit in

the latter, and *vice versa*: *Stanton v. Embrey*, 93 U. S. 548, 1876; *Ins. Co. v. Bruner*, 96 U. S. 588, 1877; *Cook v. Litchfield*, 5 Sandf. (N. Y.) 330, 1851; the question whether a suit in a state court may be pleaded in abatement of a suit in a federal court of the same territorial jurisdiction, as in this case, is still undecided, the authorities pro and con being nearly equally balanced, and the Supreme Court not yet having pronounced upon it. In favor of the validity of such a plea are: *Earl v. Raymond*, 4 McLean, (U. S.) 233, 1847; *Brooks v. Mills Co.*, 4 Dill. (U. S.) 524, 1848; *Presbyterian Church v. White*, (U. S.) 4 AM. L. REG. 526, 1856; *Nelson v. Foster*, 5 Biss. (U. S.) 44, 1857; *Smith v. Atl. Fire Ins. Co.*, 22 N. H. 21, 1850; *Cent. R. R. Co. of N. J. v. N. J. West Line R. R. Co.*, 32 N. J. Eq. 67, 1880; *Mitchell v. Bunch*, 2 Paige Ch. (N. Y.) 606, 1831. Opposed to it are: *Wadleigh v. Veazie*, 3 Sumn. (U. S.) 165, 1838; *White v. Whitman*, 1 Curt. (U. S.) 494, 1853; *Loring v. Marsh*, 2 Cliff. (U. S.) 311, 1864; *Parsons v. Greenville & Columbia R. R. Co.*, 1 Hughes, (U. S.) 279, 1876; *New England Screw Co. v. Blixen*, 3 Blatchf. (U. S.) 240, 1854; *In re Brunninger*, 7 Blatchf. (U. S.) 168, 1870; *Ranitzer v. Wyatt*, 40 Fed. Rep. 609, 1889; *State v. N. O. & N. E. R. R. Co.*, 42 La. An. 11, 1890; *Wood v. Lake*, 13 Wis. 84, 1860.

The reader may take his choice.

The Supreme Court of Iowa, following its former decision in *Opel v. Shoup*, 69 N. W. Rep. 560, has lately held, that a

Aliens,
Right to
inherit,
Treaty,
Conflict of
Laws

treaty of the United States with a foreign country providing that aliens may inherit lands is controlling, and confers that right upon them, though the laws of the state may provide otherwise:

Dochterl v. Hillner, 71 N. W. Rep. 204, and that, by the treaty between the King of Prussia and the prince of Waldeck, the citizens of Waldeck became subjects of the King of Prussia, and consequently entitled to the benefits of the treaty between the United States and Prussia governing the rights of inheritance of citizens of the respective countries: *Wilcke v. Wilcke*, 71 N. W. Rep. 201.

There is a note on this subject in the March number of this magazine : 36 AM. L. REG. & REV. N. S. 187 (1897).

The Court of Appeals of New York has recently held, affirming 41 N. Y. Suppl. 1112, that upon a proceeding for the disbarment of an attorney, the fact that some of the charges of professional misconduct brought against him are such as also to involve liability to a criminal prosecution, does not entitle the respondent to a suspension of proceedings until he has had the opportunity for a jury trial upon those charges : *Rochester Bar Association v. Dorthy*, (Court of Appeals of New York,) 46 N. E. Rep. 835, affirming 41 N. Y. Suppl. 1112.

When it is stipulated in a building contract for the execution of specified works that it shall be completed by a certain day, and in default of completion, the contractor shall be liable to pay the liquidated damages, and there is also a provision that other work may be ordered by way of addition to the contract, and additional work is ordered which necessarily delays the completion of the work, the contractor is exonerated from liability to pay the liquidated damages, unless by the terms of the contract he has agreed that, whatever additional work may be ordered, he will nevertheless complete the works within the time originally limited : *Dodd v. Chastrow*, [1897] 1 Q. B. 562.

According to a recent decision of the Supreme Court of Appeals of West Virginia, *Hoopes v. De Vaughan*, 27 S. E. Rep. 251, a suit in equity to annul a forged deed of land and have it cancelled, and the record of it declared void, brought by the legal owner of the land, who is the grantor named in the forged deed, or the party holding title from that grantor, who instituted suit to annul the deed while he is out of possession, is not taken out of the jurisdiction of equity by the fact that the deed is void, and it is not necessary that the legal owner before bringing

suit should establish his title and obtain possession of the land by ejectment at law.

The Circuit Court for the Southern District of Ohio, (W. D.) in *Voight v. Baltimore & Ohio S. W. Ry. Co.*,

**Carriers,
Railroads,
Express
Messenger,
Limitation of
Liability**

79 Fed. Rep. 561, has lately held, that while a railroad company is under no obligation to carry an express messenger as such, yet when under such a contract with the express company it does carry him, it is acting as a common carrier of persons, and he does not lose his rights and character as a passenger because he travels in a special car provided by the express company; and consequently a contract by which an express messenger so carried in a special car agrees not to hold the railroad company liable for injury to him caused by the negligence of the company or its servants is void, as against public policy. (*See note in this number.*)

The Court of Appeals of New York has recently decided, by a bare majority, that when the mayor of a city has classified the positions in the civil service of the city,

**Civil Service,
Competitive
Examina-
tions,
When not
Required**

pursuant to the civil service law, and has determined that no examinations shall be required for certain positions, his action, until judicially determined to be erroneous, is binding upon the Courts, and is a protection to the subordinate heads of departments in making appointments, and to the employees: *Chitenden v. Wurster*, 46 N. E. Rep. 857.

The Circuit Court of Appeals for the Second Circuit has lately held, following *Dennick v. R. R. Co.*, 103 U. S. 11, that

**Conflict
of Laws,
Death by
Negligence**

a right of action given by the statutes of Canada to the widow and children of one who has been killed in that country through the negligence of another, may be prosecuted to judgment by them in the courts of the United States, though the statute of the State within whose territory suit is brought (here Vermont) gives the right of action to the personal representatives of the deceased: *Boston & Maine R. R. Co. v. McDuffey*, 79 Fed. Rep. 934.

In *Re Chapman*, 17 Sup. Ct. Rep. 677, the Supreme Court of the United States has settled some vexed questions of law,

which have been prominently before the public for sometime past, growing out of the investigation by the Senate into the truth of the charges that some of its members had been dealing in the stock of the American Sugar Refining Company, the value of which was likely to be much affected by the pending tariff bill. It holds, (1) That Rev. Stat. U. S. § 102, which makes it a misdemeanor,

punishable by indictment in the Criminal Court of the District of Columbia, for any witness summoned by authority of either house of Congress to give testimony or produce papers upon "any matter under inquiry," before either house or any committee thereof, to make default, or refuse to answer, is not so connected with section 103, which declares that such witnesses are not privileged to refuse to give testimony on the ground that it may tend to disgrace or render them infamous, that, if the latter section should be held unconstitutional, the former must fall with it; (2) That the act is not unconstitutional on the ground that it delegates to the Criminal Court of the District of Columbia exclusive jurisdiction in such cases, and thereby deprives the houses of their constitutional right to punish the witness for contempt, or on the ground that, if the houses still retain their authority in that regard, the witness would be put twice in jeopardy for the same offense; since indictable statutory offences may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as a contempt; (3) That the words "any matter of inquiry," used in § 102, are to be construed as meaning any matters within the jurisdiction of the two houses which are before them for consideration, and proper for their action, and any questions pertinent thereto or facts or papers bearing thereon; (4) That within the meaning of this section, the serrate had jurisdiction to enter upon an inquiry in respect of the truth of charges in the newspapers as to alleged dealings of senators in the stock of the American Sugar Refining Company, thereby impugning the integrity and purity of such

Constitutional
Law,
Construction
of Act.
Investigating
Committees.
Jurisdiction.
Unreasonable
Searches.
Twice in
Jeopardy

members in a manner calculated to destroy public confidence in that body, and to subject the individuals to censure or expulsion; and that it was not essential to the jurisdiction that the preamble and resolution authorizing the investigation should state that the proceeding was taken for the purpose of censure or expulsion; and (5) That in such a case it is no invasion of the constitutional protection against unreasonable searches and seizures to require a member of a stock brokerage firm to state whether or not any senator had bought or sold such stock through his firm.

The same court has also declared that a city ordinance which provides that no one shall make a public address in any **Freedom of Speech** of the public grounds of the city, "except in accordance with a permit from the mayor," is not an interference with the right to freedom of speech, and does not violate the Fourteenth Amendment: *Davis v. Commonwealth of Massachusetts*, 17 Sup. Ct. Rep. 731. See note in this number.

A court of equity has undoubted jurisdiction to commit for contempt a person not included in an injunction, nor a party **Contempt, Injunction** to the action, who, knowing of the injunction, aids and abets a defendant in committing a breach of it: *Seward v. Paterson*, (Supreme Court of Judicature, Court of Appeal,) [1897] 1 Ch. 545.

The West Publishing Company has at last secured a victory in its litigation with the Lawyers' Co-operative Publishing Company, the Circuit Court of Appeals holding **Copyright, Law Reports, Infringement** that the evidence indicated a general systematic, and widespread unfair use of the copyrighted work of the complainant on the part of the editors who prepared over 6,000 of the syllabi for the cases digested from the complainant's series of reports, and that the entire work should therefore be enjoined, excepting the paragraphs digested from original sources, with the privilege, however, to

the defendant, to show by competent proof which paragraphs were prepared by the two editors found by the court not to have offended, and to move to have these paragraphs excepted from the injunction : *West Pub. Co. v. Lawyers' Co-op. Pub. Co.*, 79 Fed. Rep. 756, reversing 64 Fed. 360.

The principal points of law decided were, that a copyrighted syllabus to a legal opinion may be infringed without reproducing the original language; and that when the material evidence conclusively shows that a subsequent digester has made an unfair use of any part of a syllabus prepared by his predecessor, the presumption is that he made use of the whole syllabus, and the burden of proof lies upon him to prove that he did not do so.

In a case recently before the Court of Errors and Appeals of New Jersey, *Taylor v. Wands*, 37 Atl. Rep. 315, a married woman united with her two sons and her insolvent husband in the formation of a trading corporation, and she and her sons took all the stock issued, except one share, which was allotted to the husband, without payment. The money paid in by her on her shares was her own. Her husband was employed as president and manager of the corporation, upon a salary not shown to be unreasonable. There was no sufficient proof that the arrangement was devised to cover from his creditors any property of his. Under these circumstances, it was held, that since, in New Jersey, a married woman may embark her own money and capital in any separate business or trade, may employ agents to carry on that business, and may avail herself of their skill and ability to make it successful, she may employ her insolvent husband as such an agent, if she does so in good faith, and the profits and earnings of the business will belong to her, though they are partly due to his business ability, experience and energy; and therefore, in the case in hand, the undivided earnings of the corporation, represented by the wife's shares of stock, belonged to her, though due in part to the skillful management of the business of the corporation by her husband.

Corporations,
Formation,
Fraud on
Creditors,
Married
Women

The Supreme Court of Alabama has recently decided, that a sole stockholder (a corporation), which, by vote of the stock, authorized, for its individual benefit, the issue of bonds secured by trust deed of the property of the corporation, and thereby impaired the value of the stock, could not, for its own acts, avoid the bonds in the hands of purchasers; and though these acts of the stockholder were in favor of its own bondholders, for whose benefit it had previously mortgaged the stock, reserving the legal title and the right to vote the stock until default, a purchaser of the stock on foreclosure of the mortgage, who obtained a perfect title thereto, took none of the equities of the bondholders, and hence could not attach the bonds, except in the name of the corporation, and subject to the disability of the original stockholder: *McCalb v. Goodwin*, 21 So. Rep. 967.

**Sole Owner of
Stock,
Powers**

The fact that one person becomes the owner of a majority or all of the shares of stock of a corporation, does not work a dissolution of the corporation, nor necessarily destroy its identity as a business concern, and property conveyed to such a corporation does not become the individual property of the stockholder: *Harrington v. Conway*, (Supreme Court of Nebraska,) 70 N. W. Rep. 911.

**Ownership of
Stock by
One Person.
Effect**

A corporation is not dissolved by the concentration of its stock in the hands of one person: *Newton Mfg. Co. v. White*, 42 Ga. 148, 1871; *State v. Vincennes Univ.*, 5 Ind. 77, 1854; *Louisville Bkg. Co. v. Eiscinnon*, 94 Ky. 83, 1894; *Russell v. McTellan*, 14 Pick. (Mass.) 63, 1833; *Wilde v. Jenkins*, 4 Paige Ch. (N. Y.) 481, 1834; *Button v. Hoffman*, 61 Wis. 20, 1884; but see *Swift v. Smith*, 65 Md. 428, 1886. It remains a going concern, and the sole stockholder cannot bind it by a contract made in his own name: *Allcmon v. Simmins*, 124 Ind. 199, 1890; *Donoghue v. Indiana & L. M. Ry. Co.*, 87 Mich. 13, 1891; or transfer the legal title to its property by a conveyance in his own name; or bind it by a mortgage: *Baldwin v. Canfield*, 26 Minn. 43, 1879; *Frank v. Drenk-bruhm*, 76 Mo. 508, 1882; *Bundy v. Iron Co.*, 38 Ohio St. 300, 1882; *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 1896;

Whitlock v. Moulton, 15 Vt. 519, 1843; *Stewart v. Gould*, 8 Wash. 367, 1894; *Murphy v. Hanrahan*, 50 Wis. 485, 1880; *Button v. Hoffman*, (*supra*); or sue in his own name on a course of action belonging to it: *Fitzgerald v. Mo. Pac. Ry. Co.*, 45 Fed. Rep. 812, 1891; *Randall v. Dudley*, (Mich.) 69 N. W. Rep. 729, 1897.

The Supreme Court of the United States has ruled that the property in dogs is of an imperfect or qualified nature; and it is within the discretion of the legislature to say how far they shall be recognized as property and under what restrictions they shall be permitted to roam the street; but even if they were property in the fullest sense they would still be subject to the police power of the state, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens; and that a state statute, (Rev. Stat. Ia. § 1201, as amended July 5, 1882,) which provided that no dog shall be entitled to the protection of the law, unless placed upon the assessment rolls, and limits the recovery by the owner for the killing or injury of a dog to the value fixed by himself for purposes of taxation, is a valid exercise of the police power: *Scutell v. New Orleans & C. R. R. Co.*, 17 Sup. Ct. Rep. 693.

It is not contributory negligence in the owner of property to attempt to remove a broken live electric light wire lying upon his premises, in such a condition as to endanger his property, although it is emitting sparks and a blaze of electric light: *Leavenworth Coal Co. v. Batchford*, (Court of Appeals of Kansas, Northern Dept., E. D.,) 48 Pac. Rep. 927.

The Supreme Court of Errors of Connecticut has lately held that an electric street railway line has no right to the use of the street as a highway superior to that of a person driving on the highway; and therefore, when a driver of a wagon is on the wrong side of a street, on the track of an electric car which is approaching him, and knows that another car is approach-

ing from behind, and that it is so far away that, if it goes at its ordinary rate of speed, he can safely cross to that side of the street, he is not negligent in so doing, and in assuming that the car would not be run at a dangerous rate of speed: *Lauser v. Bridgeport Traction Co.*, 37 Atl. Rep. 379.

When the assignee for creditors of a mortgagor, by delaying to question the validity of a pledge of bonds secured by the mortgage for over eight years after it was made, and by treating it as valid led the pledgee to rely entirely on his security, and to forbear to prosecute his action on the original debt, which had become barred in the meantime by the statute of limitations, he cannot avoid the pledge as a preference: *Elt v. Sears Commercial Co.*, (Supreme Court of Rhode Island,) 37 Atl. Rep. 311.

When the indictment or affidavit, a copy of which is attached to a requisition for the return of a fugitive from justice would be held sufficient by the courts of the state where the offense was committed, the requisition must be granted, though the indictment or affidavit would not be held good by the courts of the state of asylum: *W'bb v. York*, (Circuit Court of Appeals, Eighth Circuit,) 79 Fed. Rep. 616.

The Circuit Court for the Northern District of Texas has recently decided that while the general rule is that persons prosecuted in state courts will not be released by the federal courts on *habeas corpus*, but will be left to reach the Supreme Court of the United States by writ of error, yet the federal courts have power to issue the writ when special circumstances require, possessing a discretion which must be governed by the facts of each case: *In re Grice*, 79 Fed. Rep. 627.

The controlling facts which moved the court to interfere in this case were, that the Court of Criminal Appeals of Texas had intimated that it considered the statute (the Texas anti-trust law of 1889,) under which the petitioner was indicted constitutional, whereas the circuit court held it clearly uncon-

stitutional on several grounds; and that the statute prevented the petitioner from giving bond after conviction, and compelled him to submit to imprisonment during the time required for an appeal to the court of criminal appeals, and from there to the Supreme Court of the United States; together with several minor circumstances, such as the ruling of the trial judge in a similar case, and the delay in trying the petitioner.

The married women's acts have only increased the rights of the wife, not abridged those of the husband, except as to his control over her property; and an action by a husband for the loss of *consortium*, caused by injuries to his wife through the negligence of the defendant, will still lie, though the wife has already recovered in her own right for the injuries received: *Kelly v. N. Y., N. H. & H. R. R. Co.*, (Supreme Judicial Court of Massachusetts,) 46 N. E. Rep. 1063.

A conveyance of his property by a husband will not be set aside at the suit of the wife as fraudulent, on the ground that it was made to defeat her right to attach the property to secure a contingent claim for alimony in a suit for divorce which she had threatened to bring in the absence of any showing that she had cause for divorce and alimony, or even brought, or attempted to bring, [or intended *bona fide* to bring?] any such action: *Ullrich v. Ullrich*, (Supreme Court of Errors of Connecticut,) 37 Atl. Rep. 393.

The Supreme Court of Washington has lately held in accordance with the general current of opinion, that when a candidate for office has duly qualified, and is in possession of his office under a certificate of election issued by the proper officer, and regular on its face, equity will protect him by injunction in the enjoyment of the office, and the exercise of its duties, without interference by others, until the title to the office can be adjudicated: *State v. Superior Court of Snohomish Co.*, 48 Pac. Rep. 741.

The Court of Appeals of Maryland has decided, that when the transaction out of which an alleged debt arose occurred in Maryland, being within the statute prohibiting gambling, and both parties were citizens and residents of that state, a court of equity in Maryland would restrain the creditor from proceeding against the debtor in another state, to which he had resorted to evade the Maryland laws prohibiting imprisonment for debt, the means which the foreign court would have for ascertaining the statute on which the debtor relied to avoid the transactions being imperfect, and the procuring of evidence being difficult and expensive: *Miller v. Gittings*, 37 Atl. Rep. 372.

Since a court of equity acts *in personam*, it may restrain a person within its jurisdiction from prosecuting a suit, whether at law or in equity, in a foreign court, upon a showing of facts sufficient to invoke its jurisdiction: *Pickett v. Ferguson*, 45 Ark. 177, 1885; *Engel v. Schenckman*, 40 Ga. 206, 1869; *Cole v. Young*, 24 Kan. 435, 1880; *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462, 1851; *Hayes v. Ward*, 4 Johns. Ch. (N. Y.) 123, 1819; *Vermont & Canada R. R. Co. v. Vermont Central R. R. Co.*, 46 Vt. 792, 1873. This power is most frequently exercised to restrain attempts to evade the laws of the state of the party's domicile, *e. g.*, to attach property exempt by those laws: *Allen v. Buchanan*, 97 Ala. 399, 1892; *Wilson v. Joseph*, 107 Ind. 490, 1886; *Zimmerman v. Franks*, 34 Kan. 650, 1886; *Keyser v. Rice*, 47 Md. 203, 1877; *Snook v. Suetzer*, 25 Ohio St. 516, 1874; *Griggs v. Docter*, 89 Wis. 161, 1895; and to elude the operation of the insolvent laws: *Dchon v. Foster*, 4 Allen, (Mass.) 545, 1862; *Dchon v. Foster*, 7 Allen, (Mass.) 57, 1863; *Cunningham v. Butler*, 142 Mass. 47, 1886; or to vexatious suit, or multiplicity of actions: *Texas & Pac. Ry. Co. v. Kertman*, 54 Fed. Rep. 547, 1892; *Lawrence v. Manning*, 9 N. Y. Suppl. 223, 1890; *Cuthbert v. Chanock*, 14 N. Y. Suppl. 62, 365, 1891; *Norfolk & N. B. Hosiery Co. v. Arnold*, 143 N. Y. 265, 1894. But an injunction will not be granted for this purpose, if the complainant has an adequate defence at law: *Attalla Wire & Mfg. Co. v. Winchester*, 102 Ala. 184, 1893; *Mt. Life Ins. Co. v. Fuller*.

61 Conn. 252, 1891; *Alley v. Chase*, 83 Me. 537, 1891; *Jordan v. Chase*, 83 Me. 540, 1891; *Baxter v. Baxter*, 77 N. C. 118, 1877; or because the complainant prefers to try the matter in the courts of his own state: *Cole v. Young*, 24 Kans. 435, 1880; *Carson v. Dunham*, 149 Mass. 52, 1889; *Bank of Billows Falls v. Rutland & Burlington R. R. Co.*, 28 Vt. 470, 1856. In New York, and some other states, it is held that, from principles of comity, a suit in a foreign court should never be restrained, except in very special cases: *Harris v. Pullman*, 84 Ill. 20, 1876; *Thorndike v. Thorndike*, 142 Ill. 450, 1892; *Mead v. Merritt*, 2 Paige Ch. (N. Y.) 402, 1831; *Williams v. Ayrault*, 31 Barb. (N. Y.) 364, 1860. But if such a case arises, relief will be afforded: *Prudell v. Quinn*, 7 Ill. App. 605, 1880; *Dobson v. Pearce*, 12 N. Y. 156, 1854; affirming 1 Duer, (N. Y.) 142, 1852; *Vail v. Knapp*, 49 Barb. (N. Y.) 299, 1867; *Dinsmore v. Neresheimer*, 32 Hun, (N. Y.) 204, 1884.

As a general rule, the federal courts will not enjoin the prosecution of a suit in a state court, being prohibited by statute: Rev. Stat. U. S. § 720; *Diggs v. Wolcott*, 4 Cr. 179, 1807; *Dillon v. Ry. Co.*, 43 Fed. Rep. 109, 1890; *Haines v. Carpenter*, 91 U. S. 254, 1875; *Dial v. Reynolds*, 96 U. S. 340, 1877; *The Mamie*, 110 U. S. 742, 1884. But cases may arise which fall without the statute: *Fish v. Union Pac. Ry. Co.*, 10 Blatchf. (U. S.) 518, 1873; *French v. Hay*, 22 Wall. 250, 1874; *Texas & Pac. Ry. Co. v. Kuteman*, 54 Fed. Rep. 547, 1892. So, though a state court generally will not enjoin the prosecution of a suit in a federal court: *Riggs v. Johnson Co.*, 6 Wall. 166, 1867; *U. S. v. Keokuk*, 6 Wall. 514, 1867; *Mead v. Merritt*, 2 Paige Ch. (N. Y.) 402, 1831; *Schuyler v. Pellissier*, 3 Edw. Ch. (N. Y.) 191, 1838; *Thompson v. Norris*, 63 How. Pr. (N. Y.) 418, 1882; it may do so in a proper case, and punish the offender for contempt, if he persists: *Hines v. Ransom*, 40 Ga. 356, 1869.

In a recent case before the Court of Appeals of England, *Lamond v. Richard*, [1897.] 1 Q. B. 541, the plaintiff sued to

keeper, Unlawful Ejection recover damages for unlawfully ejecting her from a hotel in which she was residing. The facts were as follows: she came in November, 1895, to the Hotel Metropole, at Brighton, of which the defendant was the manager, and stayed there until August, 1896, paying her board regularly. Her condition and conduct were not such as to justify the defendant in refusing her accommodations. On August 25, 1896, by order of the directors of the corporation which owned the inn, the undermanager had an interview with her, in which he asked her when she was going to leave the hotel; and on her replying that she should stay there as long as she liked, he gave her verbal notice that her room must be at the manager's disposal by noon on the 31st. She did not leave on that day; and on the 31st was told that she must leave, and that if she declined to do so, her luggage would be packed up by the hotel servants. In the afternoon she went out for a walk, and on her return was refused admission. Her things had been packed by the hotel and brought down into the hall, whence they were recently removed by the plaintiff. There were vacant rooms in the hotel at the time, and the plaintiff's room was required for the accommodation of other guests. On facts the court held, that the common law liability of an innkeeper to receive and lodge a guest attaches only so long as the guest is a traveler, and a person who has been received at an inn as a traveler, does not necessarily continue to reside there in that character; that it is a question of fact whether the guest is still a traveler at any given time during his residence at the inn, and one of the ingredients for determining this fact is the length of time that has elapsed since his arrival; and that if the guest has lost the character of traveler, the innkeeper is not bound to supply him with lodging; but is entitled on giving reasonable notice to require him to leave, and affirmed the judgment of the county court for the defendant, on the ground that the hotel was a "common inn."

In *Wyman v. Gay*, 37 Atl. Rep. 325, the Supreme Judicial Court of Maine lately held, that, exemption being a personal

Insolvency. privilege of the debtor, which may be waived by
Preference. him, it should be regarded as being waived when
Exemption. he conveys the property to another; and there-
Waiver fore, if the conveyance is a fraudulent preference under the
 insolvent laws, the assignee for the benefit of creditors may
 recover the property or its value.

The Supreme Court of Minnesota has ruled that it cannot
 be held, as matter of law, that because a technically insolvent
 merchant or trader suffers an action to be com-
 menced against him upon a claim to which he
 has no defence, by creditors who know him to be
 technically insolvent, and allows a judgment to be entered and
 docketed against him for want of an answer, which judgment
 becomes a lien upon his real estate, that he intended to permit
 the judgment creditors to obtain an unlawful preference:
Brian v. Scheffer, 70 N. W. Rep. 854.

The Supreme Court of the United States has recently decided,
 affirming 68 Fed. Rep. 247, that a vessel is in "collision,"
 within the clause in a policy of marine insurance,
 "free of particular average unless the vessel be
 sunk, burned, stranded, or in collision," when,
 after being completely loaded, and casting off her
 moorings, she is made fast again to await the regu-
 lation of some insignificant trouble about her machinery, and
 is then run into by a scow, in tow of a tug, which makes a
 substantial break in her iron bulwarks, though the injury is
 not sufficient to impair her seaworthiness: *London Assurance*
v. Companhia de Moagens do Barricó, 17 Sup. Ct. Rep. 785.

A verdict will be set aside when some of the jurors, during
 the trial, took dinner at a restaurant with the suc-
 cessful party, who invited them to do so, and paid
 for it: *Marshall v. Watson*, (Court of Civil Appeals
 of Texas,) 40 S. W. Rep. 352.

Jury.
Misconduct.
New Trial

Marine
Insurance.
Particular
Average
Clause.
In Collision

A court of equity has jurisdiction to appraise the rent to become due under a lease for an ensuing part of the term, when an arbitration as to the amount of the rent, provided for, has failed; and there is a failure of the arbitration, when one of two arbitrators, who were empowered to select a third, was governed as to such selection entirely by the wishes and instructions of one of the parties, and, without any other reason, refused to agree to any one of several competent and disinterested men proposed by his associate: *Grosvenor v. Flint*, (Supreme Court of Rhode Island,) 37 Atl. Rep. 304.

Lease,
Rental,
Equity
Jurisdiction

Since the plaintiff in an action for malicious prosecution is entitled, if successful, to recover damages for the injury to his reputation, he may prove newspaper publications containing plain accounts of the prosecution, without comment thereon. "A plain, uncolored statement of such proceedings in a newspaper is a privileged publication, and not in itself a tort. Such a publication is a natural and probable consequence, and a direct consequence of the institution of the prosecution; and the fact that the prosecution resulted in such a publication may properly be shown to aid the jury in estimating the damages." *Minneapolis Threshing-Machine Co. v. Regier*, (Supreme Court of Nebraska,) 70 N.W. Rep. 934.

Malicious
Prosecution,
Evidence

The Superior Court of Pennsylvania has lately decided that neither a divorce *a mensa et thoro*, with alimony, nor a settlement by her with an absconding husband of her claim for money under such divorce proceedings by accepting land in lieu of money, nor the fact that she has been declared a *feme sole* trader, will make her anything but a married woman in respect of her contracts; nothing but an absolute divorce *a vinculo matrimonii* will have that effect; and therefore a note signed by a married woman, not so divorced, though the other circumstances mentioned all exist, as surety for another, is

Married
Women,
Power to
Contract,
Divorce a
Mensa et
Thoro

void, under the married women's acts of Pennsylvania : *Harley v. Leonard*, 4 Pa. Super. Ct. 431.

The Supreme Court of Wisconsin has adopted the rule which seems consonant with reason and justice, that when a subsequent grantee of mortgaged premises, in the conveyance to him, assumes the mortgage as part of the consideration, his liability rests solely on that consideration and promise, and no other consideration need pass from the mortgagee to the grantee, though his immediate grantor was not personally liable to the mortgagee : *Finos v. Sanger*, 70 N. W. Rep. 1069.

**Mortgage,
Assumption
of Debt by
Grantee**

When a mortgagor, by recorded deed, conveys part of the mortgaged premises to one who assumes the entire mortgage debt, and then conveys the balance, free from the incumbrance, the first parcel, even in the hands of a subsequent grantee, who agrees to pay only a proportionate part of the debt, is primarily liable for the whole amount, and the mortgagee may first resort thereto, reserving the balance of the tract as a separate fund to satisfy a later indebtedness secured on that part alone : *Skinner v. Harker*, (Supreme Court of Colorado.) 48 Pac. Rep. 648.

**Transfer of
Property,
Assumption
of Debt by
Grantee**

According to a recent decision of the Supreme Court of Alabama, the rule that mortgaged premises will be subjected to foreclosure in the inverse order of alienation by the mortgagor, does not apply when the mortgage provides that any part of the land sold by the mortgagor shall be released on payment of the purchase-money on the mortgage, and the mortgagor sells a part of the premises to one who has notice of this provision, reserving a lien for the deferred payments, and delivering the notes therefor to the mortgagee. In such a case foreclosure should first be had on lands so sold for the amount due on the notes before resorting to that held by the mortgagor, or by a person who succeeds to his equities : *Northwestern Land Assn. v. Robinson*, 21 So. Rep. 999.

**Foreclosure,
Inverse
Order of
Alienation**

Ardemus Stewart.

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POLICE POWER; MUNICIPAL ORDINANCE. The Supreme Court of the United States has recently decided that a city ordinance providing that no person shall make any public address in any public grounds of the city, except in accordance with a permit from the mayor, does not violate the fourteenth amendment to the Constitution of the United States: *Davis v. Com. of Mass.*, 17 S. C. Rep. 731, (May 10, 1897). The question of the right to regulate public addresses, parades, assemblages, etc., has been treated in any but a uniform manner by the Supreme Courts of the States. The difficulty seems to be not so much the right of the State or city to regulate such rights but the manner in which said rights shall be regulated and the right to delegate the power to administrative officers. In Massachusetts, in the above case, and also in *Com. v. Abraham*, 156 Mass. 57 (1892), such a delegation of power to the park commissioners was held to be reasonable and the ordinance constitutional. In New York it was held, *Vance v. Hadfield*, 22 N. Y. S. R. 858; 51 Hun, 620, 643; 4 N. Y. Supp. 112 (1889), that an ordinance forbidding beating of drums or making any noise with any instrument whatever on any sidewalk, without written permission of the president of the village, is reasonable delegation

of police power. In California, *In re Flaherty*, 105 Cal. 558 (1895), an ordinance making it unlawful to beat a drum upon any traveled street without special permit, and giving a city officer power to grant permission, is reasonable delegation of power.

On the other hand, in Wisconsin, *State v. Dering*, 84 Wis. 585 (1893), it was held that an ordinance forbidding street parades, beating drums, etc., on certain streets without written permission of the mayor, but excepting from its provisions certain classes of organizations, is unreasonable and unconstitutional in giving to the mayor arbitrary power. And in Michigan, *In re Frazer*, 63 Mich. 396 (1886), a similar ordinance was declared to be unreasonable and void. So, in Oklahoma, *In re Gribben*, 47 Pac. Rep. 1074 (1897).

So, in Illinois, *Chicago v. Trotter*, 136 Ill. 430 (1891), an ordinance providing that no street parade shall be allowed upon certain streets without permit from police department specifying routes, etc., is unreasonable and unconstitutional, as council cannot delegate its legislative power to a mere executive officer.

It would seem that the decision of the United States Supreme Court is based upon sound law and common sense. Citizens have certain absolute rights, among them free speech and the use of the highway, but these rights may be abused as well as used, and in order to prevent abuses and protect the same rights in other citizens, there should be proper regulations for the exercise of those rights. When these regulations are made general in their nature so as not to discriminate for or against any class, and the power to enforce these regulations is delegated to a proper executive officer, there would seem to be little ground for objections.

NEGLECTANCE AT RAILROAD CROSSINGS; IDENTIFICATION. What duties do the various courts impose upon a traveler who approaches a grade crossing on the highway? A late decision of the Circuit Court of Appeals, *Pyle v. Clark et al.*, 79 Fed. Rep. 744 (March 22, 1897), well illustrates the rule adopted by the Federal courts on this subject.

In this case the plaintiff, Pyle, was driving in a wagon with his friend, Wright, when they approached a grade crossing of the Union Pacific Railway (operated at the time by the defendant, Clark and others, as receivers). They stopped at some distance from the track to allow a train to pass, and then drove across, looking only down the track toward the south. A train came from the north at a high rate of speed, and without any warning struck the wagon and injured them both. Suits having been brought, Wright was allowed to recover, but Pyle was barred from so doing on the ground of contributory negligence.

In the part of the judgment relating to the action brought against the railway company by Pyle (the driver of the wagon), Judge Sanborn lays down the rule which has been uniformly adopted by the Federal courts: "It is the duty of everyone approaching a

railroad to look both ways and to listen; and when a diligent use of the senses would have avoided the injury, failure to use them is, under ordinary circumstances, contributory negligence, and should be so declared by the court." This is evidently adopted from the language of Justice Field, in *R. R. Co. v. Houston*, 95 U. S. 697 (1877), showing that the Federal Judges consider it negligence *per se* to omit either to look or to listen.

In Pennsylvania the same rule is applied with the addition that it is the imperative duty of the traveler to stop before he attempts to cross the track. Justice Dean, in *Gray v. Penna. R. R.*, 172 Pa. 383 (1896), quotes with approval the language of Justice Mitchell in a previous case: "The rule that a traveler must stop, look, and listen is an absolute and unbending rule of law." So rigidly is this rule applied that the "stop" is construed in its literal sense, and a "bicyclist's stop," which enables the rider to obtain a fairly clear view of the track has been held insufficient: *Robertson v. Penna. R. R.*, 180 Pa. 43 (1897). In New York the Pennsylvania rule, that to stop is necessary, has been utterly discredited: *Neudoerffer v. B. H. R. R.*, 9 App. Div. 66 (1896), and this State, together with most of the others, follows the rule of the Federal courts. However, cases in Texas and Georgia have gone to the other extreme, and decide that no *specific* duties are imposed upon the traveler, the omission of which will render him guilty of negligence, but that he must simply use the care to be expected of an ordinarily prudent man: *I. & G. N. R. R. v. Durr* (Tex.), 13 S. W. Rep. 377 (1890); *R. & D. R. R. v. Howard* (Ga.), 3 S. E. Rep. 426 (1887).

It will be observed that in the case of *Pyle v. Clark*, *supra*, the court allowed Wright, who was sitting in the wagon with Pyle, to recover, the reason being that he was not considered to be identified with Pyle so as to be responsible for the latter's contributory negligence. The repudiation of the doctrine of identification is now well settled in the Federal courts, all cases on this subject following *Little v. Hackett*, 116 U. S. 366 (1885). Likewise, after a number of shifting decisions, the same is declared to be the law in all the States of this country except Michigan and Wisconsin, whose courts still apply the rule of identification laid down in *Thoroughgood v. Bryan*, 8 C. B. 115 (1849), where a rider in a private conveyance is injured through the negligence of the driver: *Cuddy v. Horn*, 46 Mich. 596 (1881); *Otis v. Janesville*, 43 Wis. 422 (1879).

CARRIERS; EXPRESS MESSENGER; EXEMPTION FROM LIABILITY FOR NEGLIGENCE. For the first time, apparently, a Federal court has been called upon to consider the validity of a contract exempting a railroad company from liability for injuries to an express messenger arising through the negligence of its servants. In *Wright v. R. R.*, 79 Fed. 561 (March 29, 1897), the messenger released the railroad company from liability for negligence. He was injured

through negligence of the railroad's employees and sued the company. Defendant set up the agreement between the parties. The Circuit Court for the Southern District of Ohio held the agreement void as against public policy and allowed a recovery. In reaching this decision, the court repudiated the decisions in the only cases that have raised the question in the state courts, viz.: *Bates v. R. R.*, 147 Mass. 255 (1888); *Hosmer v. R. R.*, 156 Mass. 506 (1892), and *Louisville, Etc., R. R. v. Keefer* (Ind.), 44 N. E. Rep. 796 (1896).

The court placed its decision on two grounds: (1) That though a railroad company is under no obligation, in its capacity as common carrier, to receive the plaintiff as a passenger into its baggage cars, yet when it does receive him into those cars under a special contract, it is performing the function of a common carrier and the plaintiff becomes a passenger for hire; (2) That if plaintiff was a passenger for hire the contract in case of the company's liability for negligence is void, as being contrary to public policy: *R. R. Co. v. Lockwood*, 17 Wall. 357 (1873).

The point, then, in which this decision differs from the three above quoted, is in holding that the messenger is a passenger, or, to put the same thought in other words, that the carrier is, as respects him, a common carrier and not a special carrier. All the cases cited agree that *R. R. Co. v. Lockwood* is a sound decision, but distinguish it on the ground that there the railroad held itself out as a carrier, and also that there was clearly a compensation received by the carrier for the issuing of so-called free passes to drovers, authorizing them to ride on the trains on which their cattle were carried. They hold that a railroad cannot be considered a carrier of passengers by baggage cars, that they are places of great danger, and that if the messenger were there without permission he might be ejected, and that hence in view of the fact that the railroad granted this special and unusual privilege, no public policy is transgressed by a stipulation for exemption. It is said in *Bates v. R. R.*, "The contract did not diminish the liability of the defendant. It left the risk assumed by the plaintiff in riding in the baggage car what it would have been without the contract; it only secured him against being ejected from the car. . . . The question of the right of carriers to limit their liability for negligence in the discharge of their duty as carriers by contracts with their customers or passengers in regard to such duties, does not arise under this contract as construed in this case.—*R. R. v. Lockwood*."

In *Louisville, Etc., R. R. v. Keefer*, the court took the view that in making such a contract a railroad company is doing something outside the scope of its occupation as a common carrier, something it is not legally compellable to do, and hence contracts in the capacity of a special carrier, and may therefore stipulate against its own negligence without violating any rule of public policy. In the latter case an analogy was drawn from the cases which decide that a contract to transport the private cars of a traveling

circus is **not** the contract of a common carrier: *Comp. v. Ry. Co.*, 56 Mich. 11 (1885); *Ry. Co. v. Wallace*, 14 C. C. A. 357 (1895).

CONSTITUTIONAL LAW; ELEVENTH AMENDMENT. There has been, in recent years, a divergence of opinion as to what constitutes a suit against a State within the meaning of the eleventh amendment to the Constitution of the United States. In *Tindal v. Wither*, 17 Sup. Court Rep. 770 (May 10, 1897), the plaintiff, having bought land from the Commissioners of South Carolina, brought ejectment against the Secretary of State, who had ousted him by virtue of his official authority as having charge of all State property. The defense was that the suit was in effect against the State, and therefore the Circuit Court had no jurisdiction.

Mr. Justice Harlan, in affirming the judgment for the plaintiff, relied principally on *U. S. v. Lee*, 106 U. S. 192 (1892). That case decided that where the agents of the United States held the Arlington Cemetery for the public use of the government, a suit in ejectment against them was not a suit against the United States, but only against the individuals as trespassers, and that such an action was maintainable as it did not conclude the rights of the United States: *Carr v. U. S.*, 98 U. S. 433 (1878).

In *cases* arising under the eleventh amendment, the earlier doctrine was that if the State was not a party to the record, the suit was not against it: *Davis v. Gray*, 16 Wall. 203 (1872). This has been abandoned, and the test is now whether the State is really interested in the event. In *Louisiana v. Jumel*, 107 U. S. 211 (1882) it was held that a mandamus would not lie against the auditor and treasurer of Louisiana to compel them to

pay bonds of the State, as they were not mere agents, but servants of the State, and the effect would be to compel the State to perform its contract. Wherever that would be the effect of a judgment, the suit is really against the State: *Hagood v. Southern*, 117 U. S. 52 (1886); *In re Ayres*, 123 U. S. 443 (1887). If the State is an indispensable party to the record to enable the court to grant relief, the suit is against the State: *Cunningham v. Macon, &c. R. R.*, 109 U. S. 447 (1883). But a suit in detinue against a treasurer who levied on the plaintiff's property for non-payment of taxes, under a void law, is an action against the wrongdoer as an individual, and not against the State: *Poindexter v. Greenhow*, 114 U. S. 270 (1884). And the Circuit Court will restrain a State officer from executing an unconstitutional statute which violates the contract made by the State with the plaintiff. As no affirmative official action is there required from the State, through its officers, it is not a suit against the State: *Pennoy v. McConaughy*, 140 U. S. 1 (1890); *In re Tyler*, 149 U. S. 164 (1892). So a suit in tort will lie against an officer who seizes the plaintiff's goods under an unconstitutional statute: *Scott v. Donald*, 165 U. S. 58 (1897), where the defendant, as constable, seized the plaintiff's liquor

under the South Carolina dispensary law, which was held unconstitutional as far as it affected interstate commerce.

From these cases it will be seen that in determining whether the suit is to be considered as against the State regard must be had to the nature of the case as presented by the whole record, not merely to nominal parties to it. As the plaintiff in the case under discussion is not suing the defendants to enforce specific performance of a contract by the State, but to recover property wrongfully taken by the defendants as individuals under color of state authority, the case falls under the rule of *U. S. v. Lee* (*supra*), and the line of cases ending in *Scott v. Donald* (*supra*).

The judgment in this case only decides the title as between the plaintiff and the defendant; and the State, not having submitted its rights in the case to the determination of the court, is not concluded by that judgment. Therefore as the suit does not affect the state, it is not a party in interest, and the suit cannot be said to be against it within the meaning of the eleventh amendment.

MASTER AND SERVANT; WRONGFUL DISCHARGE; MEASURE OF DAMAGES. The Supreme Court of Wisconsin, in the case of *Tickler v. Andre Mfg. Co.*, 70 N. W. Rep. 292 (Feb. 27, 1897), decided that a servant wrongfully discharged cannot recover his expenses in seeking other employment, though the wages so received have been credited in reduction of damages. The established rule of law governing such cases is that the servant is entitled to recover his wages for the balance of his term less what he has made or might have made from some subsequent employment during the balance of the term, and that he is bound to use due diligence in seeking such subsequent employment: *Chamberlain v. Morgan*, 68 Pa. 168 (1871); *Champlain v. Trans Co.*, 31 Vt. 162 (1858); *Perry v. Simpson, Etc., Co.*, 37 Conn. 520 (1871); *Howard v. Daly*, 61 N. Y. 362 (1875); *Bennett v. Norton*, 46 Minn. 113 (1891). Of course the damages must be limited in any case to the contract price for the entire term: *Bradshaw v. Branan*, 5 Rich. 465 (1852); *McDaniel v. Parks*, 19 Ark. 671 (1858). The discharged servant, *prima facie*, has a right to recover for the whole term and the burden of proof is on defendant to show that plaintiff has not used reasonable diligence to secure employment elsewhere. What amounts to reasonable diligence is a question of fact for the jury in any given case: *Byrd v. Boyd*, 4 McCord (S. C.), 246, (1827); *Howard v. Daly* (*supra*).

In the present case the trial court took the view that, as the master might show, in mitigation of damages, that the servant had secured other employment, the servant should be credited with reasonable expenses incurred in seeking new employment. The Supreme Court reversed the judgment, holding that the manner of obtaining employment and the place where best it may be obtained are questions to be decided by the servant himself, and that any traveling or expenses that he may consider necessary for the purpose

are matters entirely within the exercise of his own discretion, and which cannot concern the former employer. The point seems never to have been raised before.

It might be argued that the ruling of the trial judge is more likely to secure justice than that of the Supreme Court. To hold that a discharged servant must use diligence in seeking other employment, so as to reduce his master's damages, and to hold further that he cannot be credited with the expense of reasonable efforts to secure new employment, and cannot even have the question of the reasonableness of such expense submitted to a jury, seems contradictory. It is commanding a man to use due diligence, and then punishing him for its exercise by refusing him a credit for expenses incurred in his attempt to save his master from liability. If the question of what is reasonable diligence is for the jury, certainly that body would seem to be competent to determine whether or not the expenses incurred were proper.

HUSBAND AND WIFE: COMPETENCY OF WITNESSES. The Court of Criminal Appeals of Texas, in the case of *Miller v. State*, 40 S. W. Rep. 313 (April 28, 1897), decided that under the Texas Statute a prosecuting wife is not a competent witness against her husband for an abortion perpetrated by him prior to their marriage. The well-known common law rule is that a wife cannot be received as a witness for or against her husband except in suits between them or in criminal cases where he is prosecuted for an act of personal violence committed against her.

In the United States, state statutes on the subject universally exist. The Texas statute reads: "The husband and wife . . . shall in no case testify against each other, except in a criminal prosecution, for an offence committed by one against the other." Code Cr. Prac., 1895, Arts. 774 and 775. It is practically declaratory of the common law on this point and was rightly construed according to that law.

The abortion in this case was effected by drugs. It administering drugs for such a purpose is not an act of personal violence, in accordance with the rule, of course the evidence was not admissible. Nor assuming that the offence was one of personal violence would the evidence be admissible. The crime was not committed against the defendant's wife but against, at the time, an unmarried woman. Neither could she testify as an unmarried woman for she was his wife at the time she was called to the stand. In other words, in cases of this kind, the evidence, to be admissible, must be of acts of personal violence committed by a husband or wife against the other after marriage: *Pedley v. Wellesley*, 3 Car. and P. 559 (1829); *State v. Evans*, 39 S. W. (Mo. Sup.) 462 (1897). But see *Com. v. Kreuger*, 17 Co. Ct. Rep. (Pa.) 181 (1896).

The common law restriction on the competency of the husband or wife as a witness against the other being based on principles of public policy, statutes purporting to change the rule are construed

with the greatest strictness. No mere general statutes permitting all persons to testify regardless of interest affect the marital incapacity. The rule must be changed expressly or by necessary implication: *Dwelle v. Dwelle*, 46 Me. 377, 380 (1859); *Lucas v. Brooks*, 18 Wall. 436, 452 (1873); *In re Jones*, 6 Miss. 633 (1874); *Gibson v. Com.* 87 Pa. 253 (1878). The rule as laid down in these cases is according to the decided weight of authority. *Contra*, see *Merriam v. Hartford*, 20 Conn. 354, 362 (1850); *Berlin v. Berlin*, 52 Mo. 151, 153 (1873).

CARRIERS; WHO IS A PASSENGER. In *Missouri, K. & T. Ry. Co. v. Texas*, 40 S. W. 350 (Tex. Civ. App.) (Mar. 31, 1897), a person was held a passenger under somewhat novel circumstances. A boy without a ticket, but with money, and intending, as he said, to pay fare, climbed on the front platform of an express car, which the conductor could not reach while the train was in motion. The boy's excuse for choosing this rather unsuitable place for boarding the train was that he was late in reaching the station, and was obliged for his own safety to get on the front end of the first car which came by him. There was nothing to show that his tardiness was due to any fault of the company.

This exact state of facts seems never before to have been passed upon judicially. In *Perry v. Central R.*, 66 Ga. 746 (1879), Perry had bought a ticket, and was standing near the platform when the train started. He ran in pursuit and was injured. He was held not a passenger. See also *Wehster v. Fitchburg R.*, 161 Mass. 298, 37 N. E. 165 (1894); *Baltimore Traction Co. v. State*, 78 Md. 400, 28 Atl. 397 (1894). In *Sharrer v. Paxson*, 171 Pa. 26 (1895), it was decided that a passenger who has safely boarded a moving train is entitled to all the rights of any other passenger. But in that case the injured person had gotten on an ordinary passenger coach.

The cases have held for the most part that one boarding a car manifestly not intended for passengers, and without the invitation, express or implied, of the company, cannot claim a passenger's rights: *Files v. Boston & A. R.*, 149 Mass. 204 (1889); *Powers v. Boston & M. R.*, 153 Mass. 188 (1891); *Stringer v. Missouri P. R.*, 96 Mo. 299, 303 (1888); *Eaton v. Delaware, L. & W. R.*, 57 N. Y. 382 (1874).

It would be interesting to speculate on how far the decision in the principal case might be carried. It would seem that under it any one with a "*bona fide* intention" to become a passenger has a wide choice of places for boarding a train. But the decision is deprived of much of its weight by the fact that the injury was so wanton that recovery would have been allowed, even though the injured person had been a trespasser.

CONTRACTS OF FOREIGN CORPORATIONS. The question presented in *Sullivan v. Berk et al.*, 79 Fed. 200 (1897) is of importance in every state where foreign corporations are subject to regulations.

By sections 3453 and 3454, 2 Burns Rev. St. Ind. 1894, an agent of a foreign corporation is required to register in the county in which he proposes to do business and to file an order or resolution of the board of directors authorizing suit to be brought against them by service of process on him. Section 3036 (*Id.*) provides that: "Such foreign corporations shall not enforce, in any court of this state, any contracts made by their agents or by persons assuming to act as their agents, before a compliance by such agents or persons acting as such with the provisions of sections 3453 and 3454 of this act."

An agent of the company plaintiff, incorporated under the laws of Illinois, without complying with the requirements of sections 3453 and 3454 of the above act, executed in Indiana on Sept. 29, 1890 a bond and mortgage on real estate. This action was a bill by the receiver of the company plaintiff to foreclose the mortgage. The defendants filed a plea in abatement.

It was held by Baker, District Judge, that the contract was valid. Section 3456 does not purport to invalidate any contract entered into before compliance with the statutory requirements. The only inhibition is that it shall not be enforced in the courts of the State until the requirements are complied with: *Machine Co. v. Caldwell*, 53 Ind. 270 (1876); *Domestic Co. v. Hatfield*, 58 Ind. 187 (1877); *Daily v. Insurance Co.*, 64 Ind. 1 (1878); *Manufacturing Co. v. Brown*, *Id.* 548 (1878); *Insurance Co. v. Wellman*, 69 Ind. 413 (1879); *Elston v. Piggott*, 94 Ind. 14 (1883); *Westling v. Warthin*, 1 Ind. App. 217, 27 N. E. 556 (1891); *Guarantee Co. v. Cox* (Ind. Sup.), 42 N. E. 915 (1896). The terms of section 3456 refer only to state courts, and are not binding on the national courts: *Hervey v. Railway Co.*, 28 Fed. 169 (1884); *Farmers Loan & Trust Co. v. Chicago & N. P. R. Co.*, 68 Fed. 412 (1895). Hence the valid contract, although non-enforceable in the state courts, can be enforced in the Federal courts. The plea in abatement was therefore insufficient, and leave was given to answer again.

Covenants Running with the Land; Possession of Grantor; Husband and Wife; Is Possession by One Possession by Both?

In *Mygatt v. Coe* (Court of Appeals of New York), 46 N. E. 948 (April 20, 1897) Coe joined in a deed of his wife's separate real estate, with covenants of warranty and quiet enjoyment. He had been living on the land in question as head of the family, had paid the taxes and kept the premises in repair. It was, nevertheless, held by a divided court (four to three) that the husband was not in possession and that consequently his covenants did not run with the land. O'Brien, J., delivering the majority opinion, admitted a hardship to the plaintiffs but asserted the necessity of adhering to the old common law rule. There must have been transfer of possession from grantor to grantee, else there could be no land to which the covenants might be annexed.

Hartlett, J. (dissenting) said it was "no" possible to say that Coe was a stranger to the title and transferred no estate to which his covenant of warranty could attach," quoting Finch, J., in *Mygatt v. Coe*, 142 N. Y. 86, 36 N. E. 870 (1894). See also dissenting opinion of Haight, J., in *Mygatt v. Coe*, 147 N. Y. 467 (1895).

The question of how great an interest in the grantor is necessary to cause the covenants of warranty and quiet enjoyment to run with the land is historically interesting: *Noke v. Audler*, Cro. El. 373, 436 (1594); *Bedloe v. Wadsworth*, 21 Wend. (N. Y.) 120 (1839); *Slater v. Rawson*, 1 Met. (Mass.) 450 (1840); 6 Id. 439 (1843); *Wilson v. Widenham*, 51 Me. 566 (1863); *Dickson v. Desire*, 23 Mo. 151 (1856); *Fields v. Squires*, 1 Dearly (C. C. U. S.) 366, 389 (1868); *Wool v. Larkin*, 49 Ill. 99 (1868); Id. 54 Ill. 489 (1870); Rawle on Covenants for Title (5th Ed.) § 203.

The later cases all hold that mere possession in the grantor is sufficient. The controversy now is what constitutes possession. The majority of the court in the principal case, after stating that Coe negotiated the sale, executed a written contract of sale in his own name and himself received a part of the purchase money, said that those facts (and the others indicated above) did not show such interest or possession on the part of the husband as to carry his covenant down through the line of conveyances to the plaintiff. "They are all such acts of care, management and agency by the husband with respect to his wife's property as naturally and necessarily proceed from the relation of husband and wife."

The decision might have been otherwise in some states: Endlich & Richards on Married Women in Pennsylvania, § 226, seem to take the husband's liability on covenants for title in a deed of his wife's separate property as a matter of course, the only doubt being in regard to the wife's responsibility. Nothing is said about covenants running with the land but there seems no reason why, if the point should come up, the Pennsylvania courts might not hold the possession of the husband amply sufficient to carry the covenants.

See, as to husband's headship of family and possession of wife's real estate, *Johnson v. Fullerton*, 44 Pa. 466 (1863).

For excellent discussions of what constitutes possession in general, see *Williams v. Buchanan*, 1 Iredell's Law (N. C.), 535 (1841); *Rynum v. Carter*, 4 Iredell's Law (N. C.), 310 (1844); *Swift v. Agnes*, 33 Wis. 228, at 240 (1873).

BOOK REVIEWS.

A TREATISE ON THE CRIMINAL LAW AS NOW ADMINISTERED IN THE UNITED STATES. By EMLIN MCCLAIN, A. M. LL. D., Chancellor of the Law Department of the State University of Iowa. Two volumes. Chicago: Callaghan & Co. 1897.

In preparing this book "the controlling purpose has been to state the law for lawyers; and while in so doing it has been deemed of the utmost importance to clearly and succinctly present the general rules relating to the subject as announced by text writers and judges, yet the fact has also been recognized that it is in the application of these general rules, and not in the broad statement of them, that the difficulties arise which lawyers must contend with and courts must settle."

The author has cited a very large number of cases; all cases of general value from the courts of last resort in the United States, and many from the leading English reports. This two-volume treatise will in all probability prove itself to be a real contribution to legal literature.

D. P. H.

A SELECTION OF CASES ON DOMESTIC RELATIONS AND THE LAW OF PERSONS. By EDWIN H. WOODRUFF, Professor of Law in the College of Law, Cornell University.

This collection of cases by Prof. Woodruff is intended for the use of students of the law of Domestic Relations. The arrangement of the cases is admirable, and there is a very complete table of contents, which is really an excellent and comprehensive analysis of the subject. The type is much larger than in many of the case-books, which fact adds much to its value for students.

The number of cases cited under each division is not very large. That fact, however, does not detract from the value of the book, for those cases cited are well selected and as numerous as the time ordinarily given in the law schools to this course, will permit the student to examine with the care necessary for a proper understanding of the subject.

R. R. F.

HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS. By WILLIAM L. CLARK, JR., Instructor in Law in the Catholic University of America. St. Paul, Minnesota: West Publishing Co. 1897.

Clark on Corporations is one of the "Hornbook Series." Each chapter begins with a statement of leading principles in the form of a series of propositions, while the body of the chapter is devoted to a discussion of these initial propositions with ample references to judicial decisions. The text is contained in about six hundred and fifty octavo pages, and this limitation of space has made it necessary

for the author to make his treatise as terse and compact as possible. Although in a few instances the condensation has turned the exposition of a topic into a mere summary or sketch, yet on the whole the book may be said to have gained strength in proportion to its compactness and it is undoubtedly a useful contribution to the literature of corporation law.

The work is divided into fifteen chapters which are entitled as follows:—"Of the Nature of a Corporation;" "Creation and Citizenship of Corporations;" "Effect of Irregular Incorporation;" "Relation Between Corporation and its Promoters;" "Powers and Liabilities of Corporations" (three chapters); "The Corporation and the State;" "Dissolution of Corporations;" "Membership in Corporations" (three chapters); "Management of Corporations—Officers and Agents;" "Rights and Remedies of Creditors;" "Foreign Corporations." This division of the subject shows that the author has kept in mind the plan which he outlines in the preface when he says "The work is not intended to deal with corporation law in its application to particular corporations, but only with the rules and principles of law applicable to corporations generally." It is interesting to note that the entire book shows the influence of the development to which our law is beginning to be subjected through the medium of the law schools. It is, perhaps, too strong a statement to say that Mr. Clark's work is based upon the collection of cases on corporations compiled by Professor Cumming of the Columbia Law School, but certainly that admirable collection has exercised a potent influence upon Mr. Clark. The influence has been invariably an influence for good. It manifests itself not only in the division and arrangement of the subject, but in the development of particular topics. The practical utility of the work as a book to accompany Cumming's Cases is enhanced by the addition to each case of a reference to Cumming's paging as well as the reference to the original report. Another evidence of law school influence is the series of propositions on pages 263 and 264 dealing with the subject of subscriptions prior to incorporation. These propositions (as Mr. Clark tells us in a foot-note) are taken in substance from Professor Collins' syllabus on corporations used in the Cornell University Law School. As the teaching of law becomes more and more the object of special study in this country, and as an increasing number of able men give their undivided time to the investigation and analysis of particular portions of the field of law, it is to be expected that the law schools (as has long been the case on the Continent) will divide with the courts the privilege and the duty of influencing the progress of the law.

There is much in this book to commend. We welcome the satisfactory propositions which state the relation between the corporation and its creditors. It is a satisfaction to those who are interested in the study of corporations to note the distinct recognition on page 539 of the impossibility of working out a trust relation between the corporation and its creditors. The subject of

"Registration of Transfer" on page 417 *et seq.* receives careful treatment at the hands of the author. Readers of this portion of Mr. Clark's book will be interested in comparing with it the article on "The Compulsory Duplication of Stock Certificates," recently contributed to THE AMERICAN LAW REGISTER AND REVIEW by Mr. E. A. Harriman (Vol. 36, N. S. page 81). The subject of corporate power is as thoroughly discussed as the scope of the work permits. It is perhaps to be regretted that the author has not insisted upon the application of some definite and coherent theory of corporate power by which to test the relative value of those decisions which he reports as being "in direct conflict." The time is unquestionably at hand when we must give all our attention to the development of a theory of corporate power which shall afford a scientific basis for future legal development along the lines which our economic and commercial conditions seem already to have predetermined. In regard to stock issues, watered and bonus stock, etc., the author's summaries are clear and succinct. The reader, however, would have been entirely willing to indulge him in an exercise of his critical faculty in respect of such decisions as *Clark v. Bever*, and *Hendley v. Sutz* (pages 376-77). The author states these decisions with little or no comment.

Mr. Clark in dealing with the subject of irregular incorporation finds it difficult, if not impossible, to resist the temptation to explain the decisions upon a theory of "Estoppel." Upon this subject the present writer has elsewhere expressed his views at length, and a repetition of them here is unnecessary. (See "The Incidents of Irregular Incorporation," AMERICAN LAW REGISTER AND REVIEW, 36 N. S. pages 18 and 161).

Mr. Clark has added to his book an appendix, "The Logical Conception of a Corporation," by Benjamin Trapnell, Esq., of the Charleston, West Virginia, Bar. This is a concise and interesting discussion of the theory of corporate existence. The discussion is suggestive rather than satisfying. In connection with it, the reader should study Dr. Ernst Freund's "The Legal Nature of Corporations," recently published by the University of Chicago Press.

Upon the whole, it may be said that Clark on Corporations, while not a great book, is assuredly a good book, and students as well as practitioners will doubtless find it of value in their efforts to unravel many of the tangles of corporation law. G. W. P.

BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked * will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.]

TREATISES.

COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES. HISTORICAL AND JURIDICAL. By ROGER FOSTER. Three Volumes. Vol. I. Boston: The Boston Book Co. 1895.

AMERICAN RAILROAD AND CORPORATION REPORTS. Edited by JOHN LEWIS. Vol. XII. Chicago: E. B. Myers & Co. 1896.

DOMESDAY BOOK AND BEYOND. THREE ESSAYS IN THE EARLY HISTORY OF ENGLAND. By FREDERIC WILLIAM MAITLAND, LL.D., Downing Professor of the Laws of England in the University of Cambridge, of Lincoln's Inn, Barrister-at-law. Boston: Little, Brown & Co. 1897.

THE FEDERAL COURTS. THEIR ORGANIZATION, JURISDICTION AND PROCEDURE. Lectures before the Richmond Law School, Richmond College, Va. By CHARLES H. SIMONTON, U. S. Circuit Judge. Richmond, Va.: B. F. Johnson Publishing Co. 1896.

A TREATISE ON THE AMERICAN LAW OF GUARDIANSHIP OF MINORS AND PERSONS OF UNSOUND MIND. By J. G. WERNER, author of American Laws of Administration. Boston: Little, Brown & Co. 1897.

PROBATE REPORTS ANNOTATED. Containing recent cases of general value, decided in the courts of the several States on points of probate law. By FRANK S. RICE, author of American Probate Law and Civil and Criminal Evidence. Vol. I. New York: Baker, Voorhis & Co. 1897.

THE ELEMENTS OF JURISPRUDENCE. By THOMAS ERSKINE HOLLAND, D.C.L. Eighth Edition. Revised. New York: The MacMillan Co. 1896.

THE ANNUAL ON THE LAW OF REAL PROPERTY. Edited by TILGHMAN E. BALLARD, and EMERSON E. BALLARD. Vol. IV. 1895. Crawfordsville, Md.: The Ballard Publishing Co. 1897.

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JURISDICTION OF THE JUSTICE OF THE PEACE, AND THE POSSIBLE APPLICATION IN PENN- SYLVANIA OF THE SMALL DEBTORS' COURT ON THE ENGLISH PLAN.*

That the present system of administering justice in small cases through the medium of the Justice of the Peace is a misshapen and perverted thing, contributing nothing to any substantial results in the proper determination of controversies, will probably be generally conceded. How the system originated, and how it came to its present stage of perfect inefficiency, would make an interesting chapter for the legal antiquary. It is a chapter, however, apart from our present task, which is a practical rather than historical treatment of the subject.

It may be remarked in passing that the civil jurisdiction of the Justice of the Peace in Pennsylvania is very old. The first Act conferring upon him such jurisdiction, to the extent of forty shillings, was passed in 1715, since which time it has been successively increased and extended to its present proportions.

It is probable that no such results as are practically worked out were ever intended or foreseen by the framers of the

* Delivered to the Pennsylvania Bar Association, June 30, 1897, by Thomas Patterson, Esq., of the Pittsburg Bar.

legislative plan under which these courts operate, nor is its decadent condition due to any marked or organic turpitude on the part of the average Justice. Its present status is the direct result of the law, much more potent than any upon the statute books, that a man will seek and get gain where he may do so free from risks of punishment, without embarrassment from refined ethical considerations. The average man who fills the position of Justice of the Peace has his *clieutele*, and like you and myself is anxious that it should increase and multiply. Like us, he is desirous that business shall be brought to his shop, and that he may be well and favorably known in the quarters whence such business originates. If he does an injustice, are not the courts of Common Pleas open for redress, and may not the defeated litigant have his appeal upon payment of costs? If there be those whose moral natures have evolved to a higher plane than this, who would do justice though the heavens fall, and, if need be, decide against their best clients without regard to financial consequences, such are not apt to make a fatiguing canvass for the office, with the mere purpose of demonstrating their moral fitness for an unremunerative position.

In its practical workings, then, we have a system under which the judge is the adviser and counsellor of those who bring business to his doors, and whose judgments are given, not in the interests of justice, but to hold the confidence and custom of his employers. So far as the substantial results are concerned, the substitution of a slot machine which would allow the depositor of a small sum to draw a blank judgment for a limited amount, subject to appeal within twenty days, would be economical both in time and money.

The evils arising from this system, however, are much more serious than the mere question of costs. The administration of justice is, after all, a matter of delicate adjustment. It depends much on public confidence and public respect. No department of it can be prostituted without resultant damage to the whole. The ordinary citizen, unacquainted with the ways of litigation, who sees right disregarded and wrong prevail in this lower tribunal, has some reason to conclude that,

if there be a better order of things in the higher courts, it is a mere matter of chance and through no merit on the part of the law or of the law-makers.

As, also, a large percentage of the cases in which the defendant is solvent are at once appealed, we have as a further and perhaps the most serious result of this system the trial lists of the Common Pleas congested with a mass of trifling litigation; cases ordinarily involving no important questions of law, which could as well be disposed of by any impartial tribunal, and in which the public treasury could better afford to pay the plaintiff his claim than to hear his dispute.

Without going into extended statistics, a few figures taken from the records of Allegheny County, which happen to be most convenient to the writer, may be of some interest. Taking the January Term of Common Pleas No. 2, the February Term of Common Pleas No. 3, and the March Term of Common Pleas No. 1, for 1897, we find an aggregate of cases on their dockets of two thousand five hundred and fifty. Of these, six hundred and seventy-eight were appealed cases, showing costs paid on the Justice's record in the aggregate, \$2960.13. If these figures are a fair proportion of the business of the year, we may assume that about one-fourth of the cases tried by these Common Pleas Courts are appealed cases, and that the costs paid to Justices for these cases, which must be retried, amount to nearly \$12,000 per annum, a sum which, added to the subsequent record costs in the same cases, would seem quite sufficient to support a system of competent lower courts for the final adjudication of such disputes.

Having, then, glanced thus briefly at our own methods for reaching a determination of this class of cases, let us turn by way of comparison to the English Small Debt System. These courts, which are called the New County Courts, by way of distinction from the old County Courts of the Common Law, with which the student of Blackstone is familiar, were created by Act of 9 & 10 Vic. c. 95, entitled "An Act for the more easy recovery of small debts and demands in England." This act is very long and evidently prepared with the utmost

care. It provides a system of Small Debt Courts, worked out in the most minute detail. Roughly outlined, its provisions are as follows :

The privy council is authorized to divide any county or part of a county, city, borough or town into districts and to declare by what names and in what towns and places the county court shall be held in each district. The courts already existing under special acts for the recovery of small debts, are authorized to be merged in these county courts. The Lord Chancellor is authorized to appoint as many fit persons as may be necessary to be judges of these courts, and he also has authority to remove them for inability or misbehavior. The judge must be either a barrister or special pleader, who has practiced for seven years, except that in the first institution of the courts those attorneys who had already been sitting in the special courts might be reappointed and continue to act as judges in the new county courts. The judge of the county court, with the approval of the Lord Chancellor, is given authority to appoint a clerk for his court and a high bailiff, who in turn appoints his assistants, and serves process, attends the meetings of the court, and in general performs the duties of the sheriff in the higher courts. The judge is required to attend and hold county court, at the several places appointed, at least once each calendar month, or at such other times as one of the Chief Secretaries shall order. Jurisdiction is given of debts, demands and damages to not more than twenty pounds, but actions of ejectment, or actions in which any corporeal or incorporeal hereditament, toll, market or franchise is brought into question, are excluded, as are also constructions of wills, settlements, and actions for malicious prosecution, for libel, slander and seduction, and for breach of promise of marriage.

Any person desiring to bring a suit cognizable in these courts states the nature of his case to the clerk, who enters it in a book kept for the purpose. It is called a plaint, and states the names and last places of abode of the parties, and these are numbered consecutively throughout the year. Thereupon a summons stating the substance of the action and bearing the number of the plaint, under the seal of the court, is to

be served upon the defendant or at his dwelling house, the number of days prior to the term of court fixed to hear the case which shall be determined by general order. If the defendant has any special defense in the nature of a set-off or counter-claim, statute of limitation, or matter of that general nature, he is required to set it up in a defense. Otherwise he may appear at the time fixed, and the case is heard. Under the original act the parties might appear by counsel, but counsel were not allowed to address the court. If either party desires a jury trial, he is required to give notice to the clerk, whose duty it is then to communicate this fact to the other party, either by personal notice or by mailing him a letter; proof of actual service is not required. The party requesting the jury trial is also required to pay a jury fee of five shillings. A number of jurymen, in the opinion of the court sufficient, is made up from the list of the persons of the district qualified to act as *nisi prius* jurors, who are required to be in attendance at the next sitting of the court. The jurors in attendance are all sworn at the beginning of court and not separately in each case. A jury of five is impaneled, the rules as to challenges being the same as in the superior courts.

If the plaintiff does not appear, judgment of nonsuit can be given by the court and the costs of the defendant assessed against him. If the defendant does not appear, the plaintiff and his witnesses are heard and judgment given. The judge is authorized to make the judgment payable in installments at certain times, as the circumstances of the defendant may seem to him to warrant. No execution can issue on such a judgment until after default made in the installments. A case could only be removed to the superior court where it involved more than five pounds, and then only upon allowance by a superior judge. Any action brought in the superior courts for a case cognizable in the lower courts is denied costs, unless the trial judge certifies that the action was rightly brought in such court.

By the Act of 13 & 14 Vic. c. 61, jurisdiction is extended to the recovery of any debt, damage or demand, not

exceeding fifty pounds, and to such amount beyond this limitation as the parties may agree in writing so to try. The provisions of the former act prohibiting counsel from addressing the court is repealed, and the party to the suit, his general attorney, or his barrister specially retained, or any other person by leave of the court, may address the court subject to its general rules.

By this act, also, the salaries of the judges are fixed at not more than £1500 nor less than £1200 per annum, that of the clerk at £700.

An appeal is allowed to the superior courts on questions of law if the case involves more than twenty pounds; but the decision of the county court in matters of fact is conclusive.

The Act of 28 & 29 Vic. c. 99 gives equity jurisdiction on certain subjects, such as the foreclosure of mortgages, specific performance, proceedings under the trustee relief acts, and dissolution of partnership, where the amount in controversy does not exceed five hundred pounds.

It hardly needs discussion to show that the method adopted by our English brethren is a simple, practicable, working method of adjudicating small cases, so that the parties may at least feel that they have had a fair and impartial hearing. I do not mean to claim that the method as worked out in England is perfect. I believe there is some criticism there as to the heavy costs attending actions in the county courts. A recent number of Mr. Labouchere's *Truth* contained a sharp protest on the subject and instanced a case in which an action for some four pounds had been accompanied with more than twelve pounds of costs. This, however, is an evil into which we are not likely to fall, in view of our modest allowances for costs; and no one can read the English journals without realizing that the county courts are regarded as fair tribunals and their decisions commented upon with respect. Certainly our own system cannot stand for a moment in comparison with theirs.

To the suggestion that a plan working along the English lines be adopted here, it will probably be objected that it is impracticable; that a constitutional amendment and legislative

action would be necessary, which would encounter strongly entrenched opposition. Even if these objections be insurmountable, we may at least indulge ourselves the inexpensive pleasure of constructing theoretical reforms, of spreading before ourselves an intellectual feast of Harmecide, where all things we want are ready and we need but to reach out and take.

If then we may assume the *potentia remotissima* of a constitutional amendment, and a legislative committee seeking advice, let us speculate for a moment as to how far such a system could be applied to our conditions. It would seem at first necessary to make a division of the State into districts. There are fifty-eight, I believe, in England. We would probably need fully as many here. These districts could not well coincide with county lines, but would have to be adjusted after computation upon a population basis. To avoid confusion, it could be arranged that each of these districts should belong to and be a part of some one of the judicial districts into which the common pleas jurisdiction is now divided. As I would not suggest an addition to the already over-taxed election system of our State, a judge could be appointed, either by the governor or by the proper Court of Common Pleas to preside over the small debt court. Such judge to be learned in the law, and to have a competent salary, all the fees of business before him being turned over to the State; the judge to be removable by the power appointing him, to follow the words of the English statute, upon "inability or misbehavior."

Before this small debt court all causes of action arising out of contract, express or implied, to an amount not in excess of \$500 could be brought. The adjudication of the judge to be final on questions of fact, but to be subject to revision by writ of error to the Common Pleas Court, of which his district is a part, on questions of law, where the amount in dispute exceeds \$25. Either party to have the right to demand a jury trial before five jurors, upon notice and payment of a small fee as provided in the English system. The judge of each court to appoint his own clerk and constable, to perform the

usual duties of such officers. The pleadings to be most informal,—a mere statement to the clerk of the cause of action, which is then set out in the summons and to which there need be no reply unless the defendant has special matter of defense.

The Court of Common Pleas to have concurrent jurisdiction of these causes of action, but the penalty for bringing an action in the Common Pleas to be the forfeiture of costs. In this way, it is submitted, small cases could be adjudicated without greater expense to the community than is now experienced in the useless litigation before Justices of the Peace. The tribunal would be impartial, and there is no reason why the practical efficiency of the system should not be as satisfactory to the litigants as the present trials in the Common Pleas, and the waste both of time and money to them and to the State by the crowding of the Common Pleas calendar with these small cases would thus be avoided.

A word more, however, as to the practicability of some such change as is here suggested. It is noticeable that most legal reforms come from action of the legal profession. There have been, of course, exceptional laymen, such as Oliver Cromwell, who have contributed greatly to juridical progress. They do not, however, alter the historical fact, that law and legal procedure have been simplified by lawyers, in spite of the popular belief to the contrary. Perhaps this is due to the fact, that to any true workman the dignity and efficiency of his work becomes in itself an aim outside of and apart from his own pecuniary relations to his task. That which has been accomplished shows that it cannot be said that any change is impracticable in favor of which there is a consensus of opinion on the part of those who have made it a special subject of study and thought. The reform here discussed, though limited to an humble sphere, is an important one, at least as important, in the opinion of the writer, as the fixing of a common label to essentially different causes of action, or the disguising of a writ of error under the caption of an appeal.

As our population has increased, drawing its members from all sorts of heterogeneous material, the respect for law

has grown lighter, the hand of the law is less regarded. The spirit of change, of defiance of existing methods, of turbulence and unrest, seems to move upon the heart and mind of the citizen with increasing strength: the spirit—

"That bids him flout the Law he makes,
That bids him make the Law he flouts,
Till, dazed by many doubts, he wakes
The drumming guns, that—have no doubts."

There is no way in our limited sphere of action, in which we can better aid in the repression of this spirit, in strengthening the side of order, in upholding a true conservatism, than by recommending such action as shall increase the dignity of the courts and the respect with which the administration of justice should be regarded in all its parts. The theory of pure democracy upon which we have builded, that ceremonials are of no weight, that the sayings of the philosopher in his shirt sleeves are as worthy of consideration as those of the man in the gown, has its limitations. There is a subtle something, hard to define, hard to describe, which nevertheless is potent and everywhere recognized, which impresses all men in the due and formal acknowledgment in their presence of a higher power. Such a higher power, whose acts should be surrounded with all the appropriate symbols of respect, is the daily administration of justice. The Court of Common Pleas, relieved of the details of petty controversies marked by no question of merit and occupying time to but little purpose, would rise to its true position and height, as a court for the adjudication of important matters, and for the review, as a court of error, of the records of inferior tribunals. These inferior tribunals, in turn, although dealing in small cases, would be marked with all the *indicia* of the true and equitable determination of controversies, and with all the power and majesty of the law.

Such a system, so worked out, would be not the least powerful influence which would tend both to educate the citizen to a due respect for the power and value of the law, and also to give to the minister of the law a true conception of the worthiness of his office.

In conclusion, then, I would submit, that our present system is bad, in that it places judicial power in the hands of men whose pecuniary interest is served by increasing the amount of litigation before them, and who constantly decide all cases in favor of those who employ them ; that the substitution of some plan by which small cases would be fairly heard and promptly disposed of would strengthen respect for the entire judicial system, and add dignity and effectiveness to the Common Pleas in relieving them of the protracted trials of trifling cases, and making them a court of error as well as of original jurisdiction.

That the practical objections would be many, we know. We can, however, hope that such changes will come as will make our system of the administration of justice free from reproach in every respect, a system worthy of the common-sense of the community, of the dignity of the law, and of the respect and co-operation of the profession.

Thomas Patterson.

THE ADMINISTRATION OF JUSTICE IN JAPAN.

II. THE PRESENT CODES.

The rule prescribed for the Japanese judges in the decision of cases is to consider first the statute law, if any applies ; second, whatever custom may be brought to their knowledge ; third, natural equity. For twenty years past a system of Codes, based on Western legislation, has been in preparation. Ever since the drafts of the Codes were published, some four years ago, they have been constantly studied and the public has been prepared for their final enactment. All have now been enacted, but the Civil Code does not go into operation until January 1, 1896. These Codes we must now briefly notice.

The Codes of Crimes and Criminal Procedure were made by M. G. Boissonade, an eminent French jurist. M. Boissonade is seventy-one years old, and until 1873 was for twenty years an instructor in the Paris Faculté de Droit. He has for twenty years past been in the Japanese service as legal adviser to the Government and professor in the Imperial University. The Criminal Codes were begun by him in 1874 and completed in 1879. After passing through the hands of a commission they went into force in January, 1881. The Civil Code was begun by him in 1879, finished in 1889, and promulgated in 1890, to take effect January 1, 1893, but that date suffered a postponement to the one above-mentioned.

The Code of Civil Procedure was prepared by Dr. Raesler, published in draft form in 1886, and promulgated in 1890, taking effect January 1, 1891. The Commercial Code was begun in the early part of the last decade by the same jurist, and was at first promulgated with the Code of Civil Procedure, to take effect at the same time ; but a subsequent postponement was made, and now a portion only has gone into effect, the rest being likely to go into effect at an early date. The Law of Organization of Courts was prepared by H. Otto Rudarff, the son of an eminent German jurist of the last generation, and went into force November 1, 1890.

The Codes of Crimes and of Criminal Procedure are now undergoing revision, and it would be improper to attempt any specific criticism on their provisions. A brief summary only will be given. The Code contains 430 articles, divided into four books: I., General provisions; II., Crimes and Delicts against the general welfare; III., Crimes and Delicts against the person and property of individuals; IV., Contraventions. We may notice here the leading classes of offences and the leading penalties.*

It is useless to mention the numerous crimes and offences against the general welfare and against individuals, which are found in the codes of all countries, and of which the enumeration in the Japanese Code is very thorough. For example we find—apart from the principal crimes and offences—the fraudulent exercise of rights by persons who have forfeited them; destruction of or damage to thoroughfares; violation of a dwelling-house; employment of deceit or force to obstruct the sale of rice or other alimentary produce of general and indispensable use, whether at public auction or in industrial or agricultural works; employment of deceit or force against masters or workmen with the object of appreciating or depreciating wages; participation in suicide by instigation or assistance rendered; abandonment of children, the aged, the sick or the infirm; abuse of confidence in all its forms; embezzlement of goods belonging to the accused himself but seized by public authority; destruction of sluices or dykes, and so forth.

The opium evil is struck at from all quarters. "Whoever shall make, introduce, or offer for sale, in Japan, opium intended for smoking, shall be condemned to hard labor for a term;" minor confinement awaits him "who shall make, introduce or offer for sale instruments or apparatus for smoking opium." The same penalty is awarded to any one who shall provide a place for indulging in smoking and shall have derived personal profit therefrom, or any one who shall have

*This account of the Criminal Codes is abridged from a careful article by Professor G. A. Van Hamel, of the University of Amsterdam, in the "*Revue de droit international et de législation comparée*" for 1882.

incited another to make use of opium. Lastly, any individual who shall smoke it shall be punished with imprisonment with hard labor for from two to three years, and any one who shall merely be found to be the possessor or depository of opium for smoking or implements for smoking it, incurs imprisonment for from one month to one year.

Other offences against the public health are fully covered. In the same chapter, Section II., "on the adulteration of public waters," that is to say of potable waters, "so as to render their use impossible or hurtful to the health," punishes this offence with imprisonment and fine, and, in case of sickness or death resulting, with the penalties proclaimed for wilful blows and wounds followed by like results. By Section IV., "on breaches of the regulations for dangerous or unhealthy industries," the exploitation of these industries should conform to the necessary authorization and prescribed rules, under pain of fines of some magnitude; and if sickness, homicide, or personal injury ensues from the breach, the penalties applicable to homicide and corporal injury through imprudence are enforced. The same system is followed in Section V., in the case of the sale of drinks or food hurtful to health, and the sale of venomous or poisonous objects without regard to the special regulations, and in Section VI., in the case "of illegal practice of medicine."

The dreaded cholera is aimed at in another chapter, dealing with "Infractions of sanitary regulations," that is to say those regulations which, in times of epidemics or epizootics are adjusted to prevent the development of the evil by communication, or to forbid temporarily the ingress of persons or merchandise from a district presumably infected with an epidemic disease (quarantine). The latter infraction is punished with simple imprisonment from one month to one year, and a fine, with augmentation in one degree for the captain of the ship infringing the prohibition or allowing it to be infringed by other persons.

We may here remark as a curiosity the contravention, punished with one day's detention or from ten sen to one yen fine, of those who have themselves tattooed or make a business of tattooage.

Generally speaking, one is struck by the relative lightness of the penalties awarded to these diverse offences, many of which constitute injuries to the most sacred rights, especially if we compare them with European Codes. We can note, it is true, an exception to this rule—imprisonment with hard labor for from one month to six months, with a fine of from five to fifty yen, pronounced "against all persons found in the act of playing games of chance;" against "those who may knowingly furnish a site for players;" and against "those who may organize a lottery to derive therefrom a personal profit."

Death occupies the first place among the *Principal Penalties of Crimes*. It is executed in the English manner, by hanging; and further, according to the English system, adopted at the present day in Germany, the execution takes place in the interior of a prison in presence of persons designated. The number of crimes for which the pain of death is awarded is not excessive. It follows high treason only in cases of attacks achieved or attempted upon the person of the Emperor, Empress, Empress-dowager, or Prince Imperial, heir presumptive to the throne; attacks consummated (not merely attempted) upon the person of a member of the Imperial family; participation as instigator or commander-in-chief in civil war or armed insurrection whose object is to overthrow the Government of the country; and—for Japanese subjects—bearing arms against the nation or its allies, and rendering direct assistance to an enemy. Next come, as in many other legislations, assassination; actual poisoning, that is to say, murder by means of poison; murder preceded or accompanied by acts of barbarity; murder having for its aim to prepare or facilitate another crime or misdeed contemplated by its author or to aid in his impunity; parricide in the sense of the French Code—murder of any *ascendant*; wilful incendiarism of inhabited structures, ships, boats, or railway carriages containing travellers. There are other capital offences not, perhaps, always considered as meriting the extreme penalty of the law; they are burning of edifices, houses, shops, ships or vessels by persons assembled in seditious bands, the penalty attaching alike to the direct authors of the crimes and the chiefs and

ring-leaders of the bands in question, if having had cognizance of these acts they have not prevented them; throwing a train off the rails, or ship-wreck caused wilfully and with culpable intent, if the death of a person ensues; false witness against an individual who has been condemned to death and executed, if the false witness is convicted of having had the intention of bringing about the capital condemnation; the act of him who has wilfully caused to sink or founder any ship or vessel containing people, if the death of a man ensues therefrom; and even robbery with violence if homicide is a result.

The infraction provided for by Articles 363 and 364 deserves to be particularly noticed, because these Articles, like many others, bear witness to the great value that Japanese legislation attaches to family ties, especially in the ancestral line. The pain of death is pronounced upon every unjust and wilful act of a descendant, resulting in the death of an ancestor; blows and wounds, sequestration, threats, abandonment, privation of sufficient nourishment and other attentions necessary to health, or even defamation.

The principal penalties for crime are, next to the pain of death, for common crimes:—*Penal Servitude*, employment upon "works determined by the regulations," for men, in an island, for women and girls, in a prison situated in the interior of the country, whether *for life or for a term*—from twelve to fifteen years; next, *Confinement*, in a prison situated in the interior of the country, where the convicts are subject to labor determined by the regulations, whether in *major* confinement, from nine to eleven years, or *minor* confinement, from six to eight years. *Political* criminal penalties are, below the death forfeit:—*Deportation*, that is to say transportation to an island, where the convicts are kept in a special prison without being obliged to work, or after a certain time, on the decision of the Government, outside the prison in an allotted portion of the island. This is *for life or a term*—sixteen to twenty years. Next, *Detention* in a special prison situated in the interior of the country, also without enforced labor, either *major* detention from nine to eleven years, or *minor* detention from six to eight years. We have here, in short, the penalties, and dis-

inctions of penalties, that are found in many European legislations, and Japan has been able to choose more easily than Occidental States, in consequence of the quantity of iakts which belong to her.

The principal penalties for misdemeanor are :—/*imprisonment* in a House of Correction, whether with enforced labor, *major* imprisonment, or without work, *minor* imprisonment,—two penalties whose maximum and minimum are determined by law, for each breach, between eleven days and five years ; and *Correctional Fine*.—The penalties for Contraventions (*contraventions*) are *Detention (Arrêts)* in a House of Detention without enforced labor, and simple police *Fine*. Fines which are not paid within a certain period may be converted into simple imprisonment or detention.

The Code of Criminal Procedure is founded very closely upon that of France—a model which can hardly be considered as advanced as the Codes of some other nations of Europe. In many features, however, Japan has gone beyond her model. The Code recognizes provisional liberty in all cases, as the French Code has done since the modificative law of the 4th of July, 1865. It specifies the cases in which there may be decreed an "order to produce" (respectively a warrant to arrest and a warrant to detain):—"if the person summoned has no fixed residence; if the judge fears that he may take flight or cause the disappearance of the proofs existing in his possession; if he (the judge) fears that he may put into execution attempts or criminal threats." It prescribes that "the preliminary judge must not use, to obtain from the accused the proof of his guilt, either threats or false allegations;" and that the accused may "obtain a copy of the instrument containing his own declarations;" that the preliminary judge "will summon to appear before him every person who has been designated to him as a witness by the Public Minister, by the prosecutor, or the accused." In all cases "where the persons designated to be summoned are numerous either on the side of the prosecution or on that of the defence, the judge may confine himself to calling, in the first instance, for each side the five persons, in correctional matters, and the ten in

criminal cases, who have been first suggested to him or whom he deems the best informed." Let us not forget, lastly, the little detail of Article 152, providing that, "in every prison where accused persons are confined, a copy of the two Criminal Codes shall be held at their disposal," always without commentaries or commentators; that is to say that, according to Article 150, an advocate can only speak to his imprisoned client in the presence of an officer.

As to the procedure before Jurisdictions of Judgment, and as for the means of appeal, the Code has sanctioned without reserve the great principles of publicity, prompt process, oral pleading and appeal, which must always remain the principles which have become inseparable from civilization. Conformably to the rule generally received upon the continent of Europe, public action is directed by the Public Ministry, represented by Government Agents in the case of the police courts, and Procurators-General in the case of the other courts, whose functions are: "to search out offences; to require, at the hands of the judges, reports of examinations and the application of the law to offences charged; to cause to be executed the orders and decisions of Justice; to defend before Justice the interests of Society."

"In fine," says M. Van Hamel, "the Japanese Code is in no respect inferior to the French Code of Criminal Procedure in its present form. Yet more, it is superior to its model as well in some fundamental provisions as in its form, order, system of provisions, and precision of terminology."

We take up now the judicial system.* The Law of Organization of Courts has 144 articles and falls into four parts. The first treats of Courts and Public Prosecutors, and is in five chapters. 1. General provisions; 2. District Courts; 3. Provincial Courts; 4. Superior Courts; 5. Supreme Courts. The second treats of the Officers of Courts and Public Prosecutors' officers, embracing: 1. Preparation and other requisites;

* This account of the Organization of Courts and the Code of Civil Procedure is abridged from an article by H. Otto Rudarff, the author of the former, in the "Mittheil de Deutschen Gesellschaft Ostasiana." Heft 41.

2. Judges; 3. Public Prosecutors; 4. Clerks of Courts; 5. Bailiffs; 6. Attendants. The third part treats of the transaction of judicial business: 1. Sessions; 2. Language; 3. Consultation and Delivery of Decisions; 4. Rules and Orders; 5. Calendar and Holidays; 6. Mutual Assistance. The fourth part treats of the administration and supervision of the different branches.

1.—The ordinary courts, exercising jurisdiction in all matters not specially excepted as above, are as follows:

1. Ku-Saibansho (District Courts).
2. Chiho-Saibansho (Provincial Courts).
3. Koso-In (Superior Courts).
4. Daishin-In (Supreme Courts).

With the exception of the first these are all Courts of Session, the requisite numbers being in the Provincial Courts three members, in the Superior Courts five and sometimes seven, in the Supreme Court seven.

Each Sessional Court is to have several divisions for Civil and Criminal business. In these as in the District Courts (which are provided with several single judges) a division of business and an order of substitution is to be arranged, unless it is left to the option of those concerned.

The jurisdiction of the ordinary courts, in regard to the classes of cases cognizable by each, is built up in regular order from the District Court as a basis.

1. *District Courts.* 1. These take charge of civil cases involving claims to the amount of 100 yen, and of other cases (without reference to the amount claimed) in which an exact knowledge of location is required or which must, as far as possible, be decided in a particular locality, such as suits involving rents, boundaries, possession, and a few other matters of minor importance. They have cognizance also of suits on contracts of employment, for terms of not more than one year, of suits between travellers or guests and innkeepers or carriers concerning fares, charges, and baggage. It will be seen, on comparing the two classes of cases, that the District Court, as heretofore, in Japan and as in our country, has no jurisdiction over suits involving the title to property. 2. These

courts have also the oversight of guardianships, the management of the local ship and land registry offices, the charge of the register of traders, and finally the registry of such patents, trade-marks, and samples as are registered in the Patent Office, a function whose importance can be proved after it has been practically exercised. 3. They have jurisdiction also of criminal cases, not an original jurisdiction, for the summary treatment of these is reserved for the police, and takes precedence of that of these courts.

II. On the foundation of the forgoing jurisdiction is built up that of the Sessional Courts.

The Provincial Courts are the next courts of higher instance from the District Courts, that is, they entertain appeals from the decisions of the latter. 1. They have original jurisdiction of all civil cases other than those already enumerated, except suits against members of the Imperial Family; and also of all other criminal cases, except treason and capital crimes and accusations against members of the Imperial Family punishable by imprisonment. 2. These courts have exclusive jurisdiction of bankruptcy matters, as under the former law, and as under the Code Napoleon.

III. The *Koso-In* or Superior Courts come next. The law recognizes only one appeal, and of the decision on this appeal only one review. Objections to judicial decrees other than judgments are regulated by the Codes of Procedure and by special laws. The plan throughout is that the Superior Court shall be a Court of First Appeal for cases of which the Provincial Courts have original jurisdiction and a Court of Review for cases of which the latter have appellate jurisdiction. Neither civil nor criminal cases coming from the District Courts can be taken to the Supreme Court. The Superior Court has in addition jurisdiction over suits against members of the Imperial Family.

IV. 1. The Supreme Court is a court of review (final appeal) for all except District Court cases and a few special classes, and is the final court of redress. The interpretations of law announced by it are binding on all lower courts.

2. The Supreme Court is, however, after the pattern of the

German Imperial Court, a court of original and exclusive jurisdiction for treason and capital crimes.

After the Restoration, the modern office of Public Prosecutor was adopted for criminal cases, and now, by the Code of Civil Procedure, the assistance of this officer is required, as in France, in certain civil cases. The Law of Organization of Courts provides that in each court there shall be one or more Public Prosecutors. They shall institute prosecutions in criminal cases, cause them to be carried out, bring public suits, and see that the penalties imposed by courts are executed. They are empowered to express their opinions in civil cases, as already said; and to exercise such supervision over the administrative business of the courts as falls by law to their duty as guardians of the public interest.

In each court is a clerk's office for the discharge of all clerical duties. For serving summons and execution, bailiffs are attached to each court.

Before appointment to the position of Justice or Public Prosecutor two legal examinations must be passed. They are competitive, a choice however being reserved among those standing highest. These requirements observed, the candidate is placed on the eligible list; there is, however, no certainty of his ultimate selection. But should he be nominated, he must be employed as soon as a vacancy occurs. As yet he is only a supernumerary, and can be employed only in the District and Provincial Courts; in the latter only one Supernumerary Justice can be present in a Session. The appointment from the eligible list is made by the Emperor, but the actual employment in a specific position (except in the case of Presidents of Superior Courts and Chiefs of Divisions in the Supreme Court) is given by the Minister of Justice.

Graduates of the Imperial University are exempt from the first examination. Any one who has been for three years Professor or Advocate is qualified for admission to the higher positions without further examination or preparation.

Up to the present time the position of judges has been such that they could be removed at any time, and their salary

lowered or taken away; nor could they have any claim to a pension. All of these circumstances contributed to injure the position of judges and the interpretation of the law. The aim of the new law is above all things to make the judge independent, at every turn, not only of the Government but also of the public. This is the object of the provisions forbidding judges to hold any other public office, or even to take any public part in politics. Nor can they without their consent be transferred to any other office, or to another court, or be removed, or suspended, or have their salary reduced except by way of disciplinary or penal punishment. A law as to disciplinary punishments for judges was published August 20, 1890. The penalties provided for are reprimand, reduction of salary, transfer, provisional suspension, dismissal.

Judges are guaranteed a pension, and they cannot be retired against their will except by resolution of a Superior or Supreme Court on the ground of mental or physical incapacity.

The third part of the law occupies itself with provisions touching the Sessions of Court, the language to be used, Rules of Order for Courts, etc. The language is of course to be Japanese; but for the benefit of those unacquainted with the vernacular an interpreting department is provided, and when all concerned are acquainted with a particular foreign language the President may permit the proceedings to be carried on in this language. The court year coincides with the civil year. Vacation lasts from July 11th to September 11th. The holidays provided in the draft from Christmas to January 6th were struck out.

The Code of Civil Procedure is founded directly upon the German Code and differs from it only in minor particulars. Among the chief changes may be noted the full adoption of proof by rational methods (not the formal party-oath) and the securing of evidence by examination on the part of the judge and also (practically) a cross-examination by the opponent.

Moreover, the Japanese law does not provide for compulsory attendance, but it provides that the non-appearance of a party shall be taken against him. The court has the right to take the allegations of the opposite party as proved.

The German Code of Civil Procedure is divided into ten books: I. General provisions as to Judges, Parties, Proceedings; II. Proceedings in Lower Courts; III. Appeals, Reviews, Objections to Rulings; IV. Reopening of Proceedings; V. Documents and Suits on Negotiable Instruments; VI. Suits relating to Marriage and Guardianship; VII. Demands; VIII. Execution; IX. Public Summons; X. Arbitration. Out of these ten books, eight have been made, the sixth being omitted entirely and its topics being relegated to the still unpublished first book of the Civil Code, while the seventh book is placed in the second in the part relating to proceedings before District Courts.

The Commercial Code also follows the German rules with fair closeness. It has three books in all. The contents are as follows:

Book I. (Arts. 3-823). Commerce in General.

1. Commercial Matters and Merchants; 2. Commercial Registry; 3. Commercial Houses; 4. Commercial Books; 5. Agents and Employees; 6. Commercial Associations; 7. Commercial Contracts (including stipulated penalties, powers of attorney, prescription, running accounts, pledge, liens, etc.); 8. Agents, Brokers, Factors, and Carriers; 9. Sales; 10. Credit; 11. Insurance; 12. Negotiable Instruments.

Book II. (Arts. 824-977) Maritime Commerce.

1. Ships; 2. Ship-owners; 3. Ship's Creditors; 4. Masters and Seamen; 5. Contract of Affreightment; 6. Average; 7. Bottomry; 8. Insurance; 9. Prescription.

Book III. (Arts. 978-1064) Bankruptcy.

1. Adjudication of Bankruptcy; 2. Consequences of Bankruptcy; 3. Exempt Property; 4. Sequestration of Effects of Bankrupt; 5. Collection of Assets; 6. Proof of Claims; 7. Determination of Dividends; 8. Payment of Claims; 9. Criminal Bankruptcy; 10. Personal Consequences of Bankruptcy; 11. Postponement of Payment.

In regard to the provisions as to Commercial Associations, it is to be noted that the law recognizes partnerships (*Kollektivgesellschaften*), limited partnerships (*Kommanditgesellschaften*),

joint-stock companies (*Aktiengesellschaften*), and the ordinary case of association in a venture on joint account. Silent partners cannot exceed seven in number; a joint-stock company must have at least seven members and requires Government authorization. Shares must be of a minimum face value ranging from 20 to 50 yen.

The Civil Code, the most bulky of all these products of two decades' legislative activity, is in five books: I. Persons; II. Property; III. Acquisition of Property; IV. Suretyship, Real and Personal; V. Proof.

Book I. (which is preceded by a statute regulating the Application of Laws—including our "Conflict of Laws") is divided thus into chapters: I. Exercise of Private Rights; II. Nationality; III. Relationship; IV. Marriage (Conditions, Formalities, Proof, etc.); V. Divorce; VI. Parent and Child; VII. Adoption; VIII. Dissolution of Adoptive Relationship; IX. Parental Power; X. Guardianship; XI. Emancipation; XII. Interdiction (guardianship of incapables); XIII. Family Membership; XIV. Domicile; XV. Absence; XVI. Registration.

To note even cursorily the special features of this book would be to expound all the peculiar and interesting features of Japanese family life, similar as they are in many respects to Continental custom, but radically different from Anglo-Saxon individualism.

Book II. is thus arranged: Part I. Rights to Things. Chapters: I. Ownership; II. Usufruct, Common, and "Habitation;" III. Lease, Emphyteusis, and Superficies; IV. Possession; V. Real Servitudes. Part II. Rights in *Personam* and Obligations. Chapters: I. "Cause;" II. Agreements; III. Effects of Obligations; IV. Warranties; V. Extinction of Obligations.

Book III. is the longest. Chapters: I. Occupation; II. Accession; III. Sale; IV. Exchange; V. Composition; VI. Partnership; VII. Aleatory Contracts; VIII. Loans for Consumption; Perpetual Annuities; IX. Loans for Use; X. Deposit; XI. Agency; XII. Hiring of Services; XIII. Succession; XIV. Donation and Legacy; XV. Marriage.

Here, again, under "Succession," we meet with provisions peculiar to the family system of the country.

Book IV. is in two parts. Part I. Personal Suretyship. Chapters: I. Guaranty; II. Solidarity; III. Indivisibility. Part II. Real Suretyship. Chapters: I. Lien; II. Pledge of Movables; III. Pledge of Immovables; IV. Preferred Claims; V. Hypothec.

Book V. deals with Proof. Chapters: I. Personal Experience of the Court (including Views of Places and Experts); II. Direct Evidence (including Writings, Admissions, Notarial Recognizances, Testimony, etc.); III. Indirect Evidence (dealing solely with Presumptions.)

In this book comes also, as Part II., the treatment of Prescription.

Of the doctrines of the Code little can be said here, and that little will be reserved for the next division of our subject. The Civil Code is an embodiment of the latest results of modern French jurisprudence, rather than an imitation of the Code Civil. The text is clearly and accurately phrased, and the *motif* is carefully and minutely elaborated. If the whole work differs essentially in style from that with which we naturally compare it, the Draft German Code and its *motif*, the difference is to the advantage of Japan. The principle of the German authors seems to have been to generalize as widely as possible, to express no detail where it could be gathered by implication from some existing principle, and to contrive a statement of law, complicated perhaps, but invulnerable at every point; while the *motif* assumes a general acquaintance with legal science, and sets forth merely what is necessary by way of justification. The new Japanese Code, on the other hand, gives expression to every salient feature of the subject, even though it may be deducible from something already laid down, and does not hesitate to repeat a principle in every place where it may have an application; while the *motif* confessedly begins at the beginning of things for the benefit of students who have not access to European legal literature.

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**PROGRESS OF THE LAW,
AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS.**

According to a recent decision of the Court of Appeals of Kansas, (Southern Department, W. D.,) a person may erect a high board fence upon his own land, or on the division line, though by doing so he interferes with the light and air of a building on an adjoining lot, especially when the fence would not have interfered with the light and air, if the building had been placed near the centre of the lot; for the law aims to protect each person in the enjoyment of his own property: *Triplett v. Jackson*, 48 Pac. Rep. 931.

In England, by what is known as the doctrine of ancient lights, twenty years uninterrupted enjoyment gives the owner of a building a prescriptive right to the light and air coming to his windows over the land of another: Act 2 & 3 Wm. 4. c. 71; *Darwin v. Upton*, 2 Saund. 175 c. 1786; *Younge v. Shaper*, 27 L. T. N. S. 643, 1872; *Flight v. Thomas*, 8 Cl. & F. 231, 1841; *Tapling v. Jones*, 11 H. L. Cas. 290, 1865; *Simper v. Foley*, 2 J. & H. 555, 1862; *Ladyman v. Grave*, 6 L. R. Ch. 763, 1871; *Kelk v. Pearson*, 6 L. R. Ch. 809, 1871; *City of London Brewery Co. v. Tennant*, 9 L. R. Ch. 212, 1873; *Mitchell v. Cantrill*, 37 Ch. D. 56, 1887; *Robson v. Edwards*, [1893] 2 Ch. 146, 1893; *Martin v. Price*, [1894] 1 Ch. 276, 1893; *Jenks v. Viscount Clifden*, [1897] 1 Ch. 694, 1897.

But this rule has met with little favor in the United States, being rejected by most courts: *Ray v. Lynes*, 10 Ala. 63, 1846; *Ward v. Neal*, 37 Ala. 500, 1861; *Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. 111, 1894; *Ingraham v. Hutchinson*, 2 Conn. 584, 1818; *Gootwin v. Hamersley*, (Conn.) 36 Atl. Rep. 1065, 1897; *Hulley v. Security Trust Co.*, 5 Del. Ch. 578, 1885; *Turner v. Thompson*, 58 Ga. 268, 1877; *Keiper v. Klein*, 51 Ind. 316, 1875; *Stein v. Hauck*, 56 Ind. 65, 1877; *Morrison v. Marquardt*, 24 Iowa, 35, 1867; *Ray v. Sweetney*, 14 Bush, (Ky.) 1, 1878; *Oldstein v. Fireman's Bldg. Assn.*, 44 La. An. 492, 1892; *Purrie v. Fernald*, 26 Me. 436, 1847; *Cherry v. Stein*, 11 Md. 1, 1858; *Rogers v. Sawin*, 10 Gray, (Mass.) 376, 1858; *Richardson*

Pond, 15 Gray, (Mass.) 387, 1860; *Keats v. Hugo*, 115 Mass. 204, 1874; *King v. Miller*, 8 N. J. Eq. 559, 1851; *Hayden v. Dutcher*, 31 N. J. Eq. 217, 1879; *Parker v. Foote*, 19 Wend. (N. Y.) 309, 1838; *Doyle v. Lord*, 64 N. Y. 432, 439, 1876; *Knabe v. Leville*, 23 N. Y. Suppl. 818, 1892; *Lindsy v. First Natl. Bk.*, 115 N. C. 553, 1894; *Mullen v. Stricker*, 19 Ohio St. 135, 1869; *Hoy v. Sterrett*, 2 Watts, (Pa.) 327, 331, 1834; *McDonald v. Bromley*, 6 Phila. (Pa.) 302, 1867; *Hazlett v. Powell*, 30 Pa. 293, 1858; *Rennyson's Appeal*, 94 Pa. 147, 1880; *Napier v. Bulwinkle*, 5 Rich. L. (S. Car.) 311, 1852; *Klein v. Gehrung*, 25 Tex. (Sup.) 232, 1860; *Hulbard v. Town*, 33 Vt. 295, 1860; *Powell v. Sims*, 5 W. Va. 1, 1871; though it was adopted in a few early cases: *U. S. v. Appleton*, 1 Summ. (U. S.) 492, 1833; *Clawson v. Primrose*, 4 Del. Ch. 643, 1873; *Gerber v. Grabel*, 16 Ill. 217, 1854; *Hanier v. Myers*, 4 B. Mon. (Ky.) 514, 1844; *Taylor v. Boulware*, 35 Ia. An. 469, 1883; *Story v. Odin*, 12 Mass. 157, 1815; *Robeson v. Pittenger*, 2 N. J. Eq. 57, 1838; *Lampman v. Milks*, 21 N. Y. 505, 511, 1860; *McCready v. Thomson*, Dudley, (S. Car.) 131, 1837; *Berkley v. Smith*, 27 Gratt. (Va.) 892, 1876.

Accordingly, it is the general rule that, no matter what his motive, whether for his own benefit, or out of pure malice to his neighbor, one may erect any structure he pleases on his own land, though it obstructs the light coming to his neighbor's windows, and renders the latter's house uninhabitable: *Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. 111, 1894; *Lapere v. Luckey*, 23 Kan. 534, 1880; *Triplett v. Jackson*, (Kan.) 48 Pac. Rep. 931, 1897; *Letts v. Kessler*, 54 Ohio St. 73, 1896, reversing 7 Ohio Cir. Ct. 108, 1892. But the courts of Michigan hold, with better justice, that such an erection, if malicious, will be enjoined, not on the ground of interference with any right of light and air, but on the ground that it is a nuisance: *Burke v. Smith*, 69 Mich. 380, 1888; *Flaherty v. Moran*, 81 Mich. 52, 1890; *Kirkwood v. Finigan*, 95 Mich. 543, 1893.

Such an erection will be enjoined, however, if it is on the division line; for it then interferes with the plaintiff's rights: *Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. 111, 1894; *Peck v. Roe*, (Mich.) 67 N. W. Rep. 1080, 1896; *contra*, *Triplett v. Jackson*, (Kan.) 48 Pac. Rep. 931, 1897; and *a fortiori*, it will be enjoined, if it is on the land of the plaintiff: *Sankey v. St. Mary's Female Academy*, 8 Mont. 265, 1889.

An agreement by an attorney at law to undertake the conduct of a litigation on his own account, to pay the costs and expenses thereof, and to receive as his compensation a portion of the proceeds of the thing recovered, is champertous and void: *Pick v. Heurich*, (Supreme Court of the United States,) 17 Sup. Ct. Rep. 927.

In a case recently decided by the Supreme Court of Mississippi, *Carson v. Vicksburg Bank*, 22 So. Rep. 1, a member of a beneficial association, (the Knights of Pythias,) surrendered his certificate of membership, in which his wife was named as beneficiary, and took out another, ostensibly for the benefit of a brother knight, which he could do under the laws of the order, but really for the benefit of a creditor, which he could not do. On the death of the assured, the creditor brought suit to determine the application of the proceeds of the certificate; and the court held that the wife could not claim under the former certificate, as it had been cancelled by the surrender, but that the person named as beneficiary was a naked trustee for the wife and children of the assured, who were therefore entitled to the fund.

The same court has lately held, that when a mutual benefit association pays the amount of a certificate of insurance to a bank, leaving the court to determine who is the rightful claimant of the fund, it thereby waives a failure of the member assured to change the beneficiary in the words provided by the rules of the order; and that consequently, when a member of such an order, intending to change the beneficiary, wrote the name of the new beneficiary in a book belonging to his agent, and, owing to physical inability, wrote nothing further, but gave full verbal instructions to him, the certificate not being indorsed because it was then in possession of the lodge, it would be treated in equity as a complete change in the beneficiary, though not made in accordance with the rules of the lodge: *Hall v. Allen*, 22 So. Rep. 4.

A member of a railroad relief association, who has been injured and taken to the hospital of the association, for medical treatment, pursuant to its constitution and by-laws, cannot, nor can his personal representatives, recover for injuries or death due to neglect or maltreatment while in the hospital: *Martin v. Northern Pacific Beneficial Assn.*, (Supreme Court of Minnesota,) 71 N. W. Rep. 701.

In a recent case before Romer, J., of the Chancery Division, *Raffity v. Schofield*, [1897] 1 Ch. 937, it was stipulated in a building agreement that the defendant should erect certain buildings and carry out certain works on the plaintiff's land, within a specified time, and should "forthwith proceed" with and complete the works, when a lease for ninety-nine years was to be granted to him. The agreement provided that if the defendant did not perform the several stipulations therein contained, the plaintiff might by notice in writing determine the agreement and re-enter, and also contained an option to the defendant to purchase the freehold. The plaintiff, becoming dissatisfied with the slow progress made by the defendant, gave him notice to determine the agreement; but the defendant, having previously given notice to the plaintiff of his intention to exercise the option to purchase, declined to surrender possession. The plaintiff then brought suit to restrain the defendant from trespassing on or interfering with the plaintiff's possession of the land. The trial judge held that, on the evidence, the defendant had made default in not "forthwith proceeding" to carry out the stipulations of the agreement, but that as there was no condition precedent that the defendant should not have committed any breach of the conditions contained in the building agreement, the option to purchase was well exercised, and a binding contract was thereby made for the sale and purchase of the property; that the determination of the leasing part of the building agreement by the notice given to the defendant for breach of its conditions did not destroy or affect the contract for sale created by the exercise of the option to purchase; and that the plaintiff's action must therefore be dismissed.

The Supreme Court of the United States has lately held, that the fourth section of the interstate commerce act, which prohibits a greater charge for a shorter than for a longer haul over the same line in the same direction, applies, in respect of railroad transportation, only to the carriage by rail; and when the property has been discharged from the company's cars at the place of destination, without any greater charge for the shorter haul, the obligations of the company under that section are fulfilled, and it is no violation thereof for the company to furnish free cartage to the stores or business houses of the consignees, though by so doing the

Building
Agreement,
Landlord and
Tenant,
Option to
Purchase,
Breach of
Condition

Carriers,
Interstate
Commerce
Law,
Long and
Short Haul,
Delivery

total cost of delivery for the shorter haul is made greater than that for the longer: *Interstate Commerce Commission v. Detroit, G. H. & M. Ry. Co.*, 17 Sup. Ct. Rep. 986, affirming 74 Fed. Rep. 803.

The Supreme Court of Pennsylvania has recently ruled, that though lands in another state are subject to the collateral inheritance tax imposed by the laws of the testator's domicile, if converted by the will at the time of his death, they will not be so subject, when a time in the future is specified for the sale of the lands, or when the direction to sell is merely permissive: *In re Handley's Estate*, 37 Atl. Rep. 587.

According to a late decision of the Supreme Court of Mississippi, an agreement between several fire insurance companies to delegate to an association of persons the power to prescribe premium rates, and to abide by the rates so fixed, is a "trust and combine," within Code Miss. 1892, § 4437, sub-d. g., defining a trust and combine as an agreement between several persons or corporations to place the control "of business," to any extent, "in the power of trustees, by whatever name called:" *American Fire Ins. Co. v. State*, 22 So. Rep. 99. See *Beechley v. Mulville*, (Iowa,) 70 N. W. Rep. 107, 1897; 36 Am. L. REG. & REV. (N. S.) 255.

The Supreme Court of Arkansas has upheld a statute, (Act. Ark. March 25, 1889,) which provides that "whenever any corporation or person engaged in the business of operating or constructing any railroad or railroad bridge, shall discharge, with or without cause, or refuse to further employ, any servant or employe thereof, the unpaid wages of each servant or employe then earned at the contract rate, without abatement or deduction, shall be and become due and payable, on the day of such discharge or refusal to longer employ, and if the same be not paid on such day, then, as a penalty for such non-payment, the wages of such servant or employe shall continue at the same rate until paid: provided, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time;" refusing to declare it unconstitutional, on the ground that the damages allowed as a penalty for non-pay-

ment were unreasonable or excessive, or that it denied the "equal protection of the laws," within the meaning of the Fourteenth Amendment, to the particular class of corporations to which it applied: *St. Louis, I. M. & S. Ry. Co. v. Paul*, 40 S. W. Rep. 705.

The Circuit Court for the District of Indiana has recently ruled, that in an action to recover the penalty for violation of the contract labor laws, a declaration is insufficient, if it fails to show the character of the labor which the immigrant was to perform, or, at least in substance, the terms of the contract under which he came to this country; and also if it fails to allege definitely that he actually came here pursuant to the contract, or to set forth the acts done by the defendant to assist or procure his immigration: *United States v. Gay*, 80 Fed. Rep. 254.

Contract
Labor Laws,
Action to
Recover
Penalty,
Declaration

In an action by a passenger against two railroad companies for injuries caused by a collision between their trains, neither defendant is entitled to judgment over against the other, in any event, since the plaintiff is entitled to judgment against either defendant only on showing that its negligence contributed to the accident; and, if the defendants were jointly negligent, there can be no contribution between them, since each was an independent agent: *Missouri, K. & T. Ry. Co. v. L'aucc*, (Court of Civil Appeals of Texas,) 41 S. W. Rep. 167.

Contribution,
Joint Tort-
feasors,
Railroad
Companies

The Supreme Court of Nevada has re-enunciated several principles of corporation law, which are of frequent application, *i. e.*, (1) that the president of a corporation cannot adjourn a meeting of the stockholders without day, against their will; (2) That if he attempts to do so, and refuses to preside or to permit the meeting to be continued in the office of the company, the stockholders may adjourn, without him, to another room, and there hold their meeting; (3) That at a stockholders' meeting, the right to determine the validity and ownership of stock, and the right to vote thereon, is not vested in the president alone; (4) That stockholders may transact at an adjourned meeting any business that might have lawfully been transacted at the original meeting; and (5) That the stockholders may elect directors when the shares of stock stand on the books of the company in the name of trustees, without the names of the *cestuis que trust* being indicated,

Corporations,
Meetings,
Adjournment,
Right to Vote

though it is provided by statute that the names of the *cestuis que trust* of stock shall be placed upon the book of the corporation: *State v. Cronin*, 49 Pac. Rep. 41.

In a case recently before the Supreme Court of Wisconsin, *McElroy v. Minnesota Pecheron Horse Co.*, 71 N. W. Rep.

One-man
Company.
Acts of
President

652, it appeared that the president of a corporation owned all the stock except six shares kept in the names of officers to render them eligible to office. The board of directors consisted of himself, his relatives, and one employee. He had managed the corporate affairs for five years without any objection by the stockholders or directors, and during this time the only meeting held was for the purpose of electing new directors in the place of others who had resigned. The president had also for two years been negotiating a sale of the property of the corporation. Under these circumstances it was held that a contract for the sale of all the assets of the corporation, consisting of real estate, made by the president alone, was binding on the corporation, since all the powers of a corporation, vested solely in the board of directors, may be conferred upon the president or other officers by implication arising from the way in which the corporation has directed its affairs, or suffered them to be conducted.

According to the Supreme Court of Pennsylvania, a non-resident alien is not entitled to the benefit of the Act of April 26, 1855, P. L. 309, which gives a right of action to certain members of the family of one whose death is caused by the wrongful act of another: *Deni v. Penna. R. R. Co.*, 37 Atl. Rep. 558.

The Supreme Court of Nevada has recently made havoc of the ballots cast at an election, holding illegal the following: those marked with a cross in the blank space for presidential electors under the words "Vote for three," and not opposite the name of any candidate; those marked with a cross after the names of presidential electors, placed in a square made by the voter; those marked with a cross after the name of an officer to be elected for another township; those marked with a cross made with a purple instead of a black pencil; those disfigured by a partially erased cross; those with the word "canceled" written on the back thereof with ink; those marked with a

Elections,
Ballots,
Marking

mark more like a spider than anything else; those marked with three lines forming a star; those marked with crosses forming a star; those marked with crosses beneath the names of the presidential and vice-presidential candidates; those marked with a cross in a vacant square not opposite the name of any candidate; and those marked with a cross between the names of two candidates, so that it was impossible to determine for which the voter intended to vote; but graciously permitted those which bore an irregular pencil mark, clearly made by accident, to be counted. It also held that as the ballot law provided for a perforated line from the top to the bottom of the ballot, that the number on the ballot should be the same as on the corresponding stub, that the ballots should be bound in stub-books, and that the ballot officer should detach the slip from the ticket, the failure of the election officer to detach the stub bearing the number of the ballot, and the voting of the ticket with the stub attached, rendered the ballot void, on the ground that: "It was equally the duty of the voter to know the stub was detached, that the ballot bore the water-mark, and had attached thereto the strip on the right-hand side bearing the number. He had the means of knowing these facts, and should be held to exercise some intelligence and some diligence in casting his ballot. When he blindly accepts a ballot from an election officer bearing marks that will destroy the secrecy of the ballot, he should be held to know that fact:" *Sweeney v. Hjul*, 48 Pac. Rep. 1036.

The Court of Civil Appeals of Texas has very sensibly ruled that when a ballot has upon it the name of an individual, but does not disclose the office voted for, and it appears that he was a candidate for the office of alderman and no other, and that no one else of the same name was a candidate for any office at that election, the ballot will be construed as a vote for that person for alderman: *State v. Mahucke*, 41 S. W. Rep. 185.

According to a late decision of the Court of Appeals of New York, the owner of an elevator for passengers is not subject, so far at least as any part of the plant other than that by which the elevator is moved and controlled is concerned, to the rules that apply to a railroad company in respect of its road-bed, engines, etc., and is not held bound to exercise the utmost care and diligence, and liable for the slightest

Elevator.
Injury to
Passenger.
Liability of
Owner

neglect; but if he exercises due diligence to provide a safe and suitable car and other appliances for the operation of the elevator and the accommodation of passengers, he is not liable for an accident which could not with reasonable diligence have been foreseen and provided against: *McGrell v. Buffalo Office & Bdg. Co.*, 47 N. E. Rep. 305, reversing 35 N. Y. Suppl. 599.

While a witness may ordinarily testify to a conversation had by him through a telephone with another person, though he is not able to identify the voice of the person responding, yet, when the latter is to be charged with notice of the conversation, (as when it is sought to charge an indorser of a promissory note with liability by a notice of dishonor thus communicated,) it must clearly appear that the one who answered was the one who is to be charged; and therefore, when the only evidence of the giving of the notice aforesaid was the testimony of a witness that he called up the office of the indorser, and did not know whether or not it was the indorser or his bookkeeper, or either of them, that answered, it was held that the sustaining of a demurrer to this testimony, on the ground that it furnished no evidence that notice of dishonor was given, was not error: *C. C. Thompson & Walker Co. v. Appleby*, (Court of Appeals of Kansas, Southern Department, C. D.,) 48 Pac. Rep. 933.

Evidence as to a conversation carried on over a telephone may be given by one who took part in it, if the other party is sufficiently identified: *e. g.*, when the witness testifies that he knew and distinguished the voice of the person at the other end of the telephone: *Stapp v. State*, 31 Tex. Cr. Rep. 349, 1894. So, testimony that the one who spoke to the witness gave his name, and that the witness went immediately to the office of the person named, who admitted the conversation just had by telephone, sufficiently identifies the one who spoke to the witness: *William Deering & Co. v. Shumpick*, (Minn.,) 69 N. W. Rep. 1088, 1897.

Further, one who heard the conversation, or only one side of it, can testify to what he heard, if the person at the other end of the instrument is identified; and consequently, when it is admitted that the conversation was carried on between plaintiff and defendant, one who heard one side of it can testify, though he did not know of his own knowledge with whom the conversation was held: *Miles v. Andrews*, 153 Ill. 262, 1895.

A false letter, purporting to have been written by another with intent to influence the collector of customs to reject the application of a Chinese subject to land, is not an instrument which could defraud, within Penal Code Cal., § 470, defining forgery with such particularity that, as the annotator says, "it was evidently intended to cover every case that could arise:" *People v. Wong Sam*, (Supreme Court of California,) 48 Pac. Rep. 972.

The fact that an insolvent's father, to whom he had transferred property in payment of a debt, organized a corporation several months afterwards, and employed the insolvent therein at a moderate salary, does not show a secret understanding in the transfer, when the father is wealthy and liberal, and all the parties to the transfer testify that it involved nothing but what appeared on its face: *Henderson v. Perryman*, (Supreme Court of Alabama,) 22 So. Rep. 24.

The Supreme Court of the United States has recently decided, that a tug engaged in towing barges from one port to another is not bound up with them into a single maritime adventure, so as to be subject to the law of general average, even though her compensation for the towage is measured by the freight carried by the barges; and consequently the act of the tug in cutting loose from them, and allowing them to go ashore, in order to save herself from a like fate, will not subject her to a general average contribution: *The J. P. Donaldson*, 17 Sup. Ct. Rep. 951, reversing 21 Fed. Rep. 671.

When a criminal prosecution is threatened under color of an invalid statute for the purpose of compelling the relinquishment of a property right, the remedy in equity is available, and a preliminary injunction may properly issue: *Central Trust Co. of N. Y. v. Citizen's St. Ry. Co.*, (Circuit Court, D. Indiana,) 80 Fed. Rep. 218.

Apprentice workmen, who have allowed their wages to accumulate upon an agreement that they should be paid at the end of their apprenticeship, have no more extensive right to a preference upon the insolvency of the corporation by which they are employed, than have any other unpaid workmen in its employ, unless such a right is expressly conferred by

statute: *Mingin v. Alva Glass Mfg. Co.*, (Court of Chancery of New Jersey, Grey, V. C.) 37 Atl. Rep. 450.

The Supreme Court of Pennsylvania has recently held that a policy which insures against loss caused by "accidental damage to or destruction of" property, "excepting only damage or destruction by fire or lightning," covers a loss due to a flood: *Hey v. Guarantors' Liability Indemnity Co. of Pennsylvania*, 37 Atl. Rep. 402.

The Court of Appeals of Kentucky has lately ruled (1) That death caused by the sting of an insect is effected through "external, violent and accidental" means, within the meaning of an accident insurance policy; (2) That the sting of an insect is the proximate cause of death resulting from blood-poisoning caused by the sting; and (3) That a death from blood-poisoning caused by the sting of an insect is not the result of "poison in any form or manner," or of "contact with poisonous substances," within the meaning of those terms in an accident insurance policy: *Omberg v. United States Mut. Assn.*, 40 S. W. Rep. 909.

The Supreme Court of New York, Appellate Division, First Department, has recently passed upon several questions arising out of a credit insurance contract, holding (1) That under a credit insurance policy covering loss sustained by reason of the insolvency of debtors owing the insured for merchandise sold between September 1, 1892, and September 1, 1893, in excess of 1¾ per cent. on the total gross sales made during that period "subject to the terms and conditions provided below and attached hereto," to which was attached a rider providing that it should cover all losses on sales made within one year preceding August 31, 1892, except such losses as the insured had notice of before August 31, 1892, or where an extension had been granted to the debtor, but providing for no deduction from the gross sales made during that year, there should be deducted, in computing the amount of loss, only 1¾ per cent. of the amount of sales made in the year beginning September 1, 1892; (2) That a conveyance by a debtor to a trustee for distribution of the proceeds among specified creditors, reciting in the conveyance that such goods are "only a part of his

property," is not a "general assignment for the benefit of creditors," within a credit insurance policy insuring against any "loss sustained by reason of the insolvency of debtors" of the insured, and defining such losses as those arising on sales by the insured to persons who have made a general assignment for the benefit of their creditors; and (3) That when a policy of insurance against loss by reason of the insolvency of the debtors of the insured limits the liability of the insurer to a specified sum on any one loss, and provides in one clause that, when only part of a loss is covered by the policy, "the proportionate part of everything realized or secured by the indemnified shall be credited to so much of the loss as is covered," and in another that all payments and securities should be deducted before determining the insurer's percentage of loss, the former provision is not affected by the latter, which merely provides for the deduction of payments and securities without specifying the mode thereof: *Goodman v. Mercantile Credit Guaranty Co. of N. Y.*, 45 N. Y. Supl. 508.

In the opinion of the Court of Errors and Appeals of New Jersey, a policy-holder in a credit insurance company, (which insures traders against losses occurring through the insolvency of their customers,) cannot recover for losses sustained after the company becomes insolvent, whether the sales which led to the loss were made before or after that date, but can only recover the unearned premium, when there is no reserved value to the policy, nor any method of reinsuring: *Gray v. Reynolds*, 37 Atl. Rep. 461.

The Supreme Court of Minnesota has recently declared that it is a rule of fidelity insurance, (which amounts to a continuing suretyship for the faithful discharge of his duties by a servant,) that if the master discovers that the servant has been guilty of dishonesty in the course of the service, and thereafter continues him in that service, without notice to and the assent of the surety, express or implied, to that course, the latter will not be liable for any loss arising from the dishonesty of the servant during his subsequent service; but that this rule has no application to mere breaches of duty or contract obligations on the part of the servant, not involving dishonesty on his part or fraud or concealment on the part of the master: *Lancashire Ins. Co. v. Callahan*, 71 N. W. Rep. 261.

The Supreme Court of the United States has at last settled the long disputed question as to the power of the Interstate Commerce Commission to fix rates for carriage by railroad, holding that the powers of the commission are judicial and administrative, but not legislative, and that, after having judicially declared an existing rate of tariff charged by a carrier to be unreasonable, it has no power to prescribe a rate to control in the future, and to enforce its order by proceedings in mandamus: *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 17 Sup. Ct. Rep. 896. Mr. Justice Harlan dissented.

Interstate
Commerce
Commission.
Powers.
Fixing Rates

The Circuit Court for the Western District of Virginia has lately held, that when an action is pending against a common carrier to recover for the loss of a shipment of cigars, and the quality and value of the cigars are in issue, the fact that the plaintiff conducted three jurors to his agent's place of business, and gave them a box of cigars, is sufficient ground for enjoining the enforcement of the judgment: *Platt v. Threadgill*, 80 Fed. Rep. 192.

Judgment.
Misconduct of
Jury.
Relief

A tenant of the third and fourth floors of a building, whose water supply is cut off, furniture injured by dust and lime, and ingress and egress interfered with, causing damage, by the landlord's repairing the second floor, may recover from the landlord for breach of covenant of quiet enjoyment, irrespective of his negligence: *McDowell v. Hyman*, (Supreme Court of California.) 48 Pac. Rep. 984.

Landlord and
Tenant.
Quiet
Enjoyment

The Vice-Chancellor for Ireland has recently decided, that brick-clay, lying about fifteen inches beneath the surface, was included in a reservation in a lease, reserving all mines of lead, ore, tin and other minerals, coal, and all quarries of marble, freestone, limestone, and building stones, slates, and other quarries, whatsoever, (save so much as might be used for building or improvement on the premises,) as also all marl, fuller's earth, . . . bogs, turf, mosses, and turbaries, and giving the landlord power to bore, search for, dig, and carry away bog, timber, mines, minerals, marble, coal, freestone, marl, building stone, limestone and slate, fuller's earth, and turf: *Shaftesbury v. Wallace*, [1897] 1 I. R. 381.

Lease.
Reservation
of Mines and
Minerals.
Ejusdem
Generis.
Brick-clay

Libel, Privileged Communications
 In *Youmans v. Smith*, (Court of Appeals of New York,) 47 N. E. Rep. 265, the counsel in a disbarment proceeding prepared a list of questions to be asked witnesses, which might in certain contingencies be competent and material, and caused these questions to be printed for submission to the witnesses in preparation for the hearing. The respondent sued the printer for libel, and the jury found for him, and this judgment was affirmed by the general term: 25 N. Y. Suppl. 1130. But the Court of Appeals reversed the latter decision, holding that although a printer who prints a libel and delivers the printed copies to the author, knowing that he intends to submit them to others to read, becomes liable as a publisher of the libel from the moment that any third person reads it, provided the words are not privileged, yet in the case in hand the questions, though they contained matter defamatory of the plaintiff, were privileged in the hands of the counsel and his agents, at least while used solely for the purpose for which they were prepared; and that the printer was, therefore, not liable.

Lottery, Slot Machine
 In *Loiseau v. State*, (Supreme Court of Alabama,) 22 So. Rep. 138, several persons each dropped nickels into a slot machine owned by the defendant, agreeing among themselves that the one after whose play the machine should indicate the highest card hand should have all the cigars that the nickels purchased. The defendant furnished from his stock a nickel cigar for each nickel put into the machine, and delivered them to the person who obtained the best hand. Upon these facts it was held, that the machine, when put to such a use, was a lottery, which, under Const. Ala. art. 4, § 26, the general assembly had no power to legalize.

Mandamus, Reinstatement of Suit
 Mandamus will lie to compel the judge of an inferior court to reinstate a criminal cause, which, for reasons insufficient in law, he has discontinued: *Ex parte State*, (Supreme Court of Alabama,) 22 So. Rep. 115.

Master and Servant, Fellow-servant
 According to a recent decision of the Court of Civil Appeals of Texas, the operator of an elevator in a hotel is a fellow-servant of a chambermaid who rides in the elevator in the discharge of her duties: *Oriental Investment Co. v. Sline*, 41 S. W. Rep. 130.

The doctrine, that when a municipal incorporation is wholly void *ab initio*, as being created without warrant of law, it can create no debts and can incur no liabilities, does not apply to the case of an irregularly organized corporation, which has obtained, by compliance with a general law authorizing the formation of municipal corporations, an organization valid as against everybody except the state acting by direct proceedings. Such an organization is merely voidable, and, if the state refrains from acting until after debts are created, the obligations are not destroyed by a dissolution of the corporation, but it will be presumed that the state intended that they should be devolved upon the new corporation which succeeded, by operation of law, to the property and improvements of its predecessor: *Shapleigh v. City of San Antonio*, (Supreme Court of the United States,) 17 Sup. Ct. Rep. 957.

The Supreme Court of Montana has lately held that the provisions of Comp. Stat. Mont. 1887, § 345, forbidding a mayor to be interested directly or indirectly in the profits of any city contracts entered into while he is in office, do not apply to the case of a mayor who was not interested in a contract made with the city, but who agreed, after the contract was accepted, and filed with the proper official, to take stock in a corporation which succeeded to the rights of the original contractors: *State v. Mayor, etc., of City of Great Falls*, 49 Pac. Rep. 15.

Under a charter which empowers a municipal corporation to regulate the carrying on of any dangerous business, to make provision for the inspection of steam boilers, to license engineers using such boilers, and to provide for the election or appointment of officers required by the charter or authorized by ordinance, the corporation has power, as a regulation for the public safety, to pass an ordinance prohibiting the owners of steam boilers from employing as engineer any person who has not first obtained a permit from the boiler inspector, or a license from the board of engineers, and providing for the appointment of such officers and for the punishment of a violation of the ordinance: *City of St. Louis v. F. McYrose Lamp Mfg. Co.*, (Supreme Court of Missouri, Division No. 2,) 41 S. W. Rep. 244.

In the opinion of the Court of Chancery of New Jersey, an abutting owner has the right to run electric wires above the

Streets,
Rights of
Abutting
Owner

street for the purpose of connecting buildings on his property with the wires already on poles in the public streets lawfully erected for the purpose of supplying lights, without asking permission of the city; and the latter cannot enjoin the running of such wires as a nuisance: *Mayor, etc., of Borough of Brigantine v. Holland Trust Co.*, 37 Atl. Rep. 438.

In an action by the next of kin to recover for the death of one killed by a mob, as authorized by the law of Kansas, (Gen. Stat. Kans. 1889, §§ 2590, 2591.) which makes incorporated cities and towns liable for damages that accrue within the corporate limits in consequence of the action of mobs, the reputation and conduct of the deceased may be given in evidence in mitigation of damages, under the second section of the act, which provides that "in all actions under the preceding section the character, use or manner of occupancy of the property lost and destroyed, and the reputation and conduct of the person injured, may be given in evidence in mitigation of damages;" and such testimony is not confined to the general reputation of the deceased, but the defendant may show any misconduct or crime, committed within a reasonable time prior to the killing, which may have influenced the mob, or which would affect the value of his life to the next of kin: *Adams v. City of Salina*, (Supreme Court of Kansas,) 48 Pac. Rep. 918.

Quere, whether the defendant could give in evidence, under this ruling, prior declarations of the plaintiff that he wished the deceased were dead?

According to a late decision of the Supreme Court of New York, Appellate Division, Second Department, two persons, with a wagon, engaged in moving furniture, are engaged in a joint venture, and the negligence of one in the management of the wagon is imputable to the other: *Schron v. Staten Island Electric R. R. Co.*, 45 N. Y. Suppl. 124.

In a case recently decided by the Court of Appeals of Ireland, *Murphy v. Great Northern Ry. Co.*, [1897] 2 I. R. 301, a railway porter, in the employ of the defendant company, wheeled a barrow with luggage thereon to a side entrance to the defendant's station at Derry, and left it standing close to the top of the steps leading down to the public foot-path outside. Some "badge-porters," (men who carried luggage from the

Negligence,
Imputable,
Joint Venture

Railroad
Company,
Master and
Servant

station to the passenger's destination.) licensed by the corporation of Derry, but not employed by or subject to the control of the defendant company, rushed up the steps—as was usual when the constable whose duty it was to keep them off the platform and to maintain order among them was absent, as he was on this occasion—and in a struggle for the luggage, upset the barrow and the trunks on it, which tumbled down the steps and injured the plaintiff, a passenger, who was waiting on the footpath below for his luggage to be brought out. On these facts it was held that the plaintiff was not entitled to recover, since he had sued the defendant for the negligence of its servant, and had at first attempted to prove that the porter had himself wheeled the barrow over the steps.

This case furnishes an excellent instance of the evil results of trying a case on a wrong theory. If the plaintiff had charged that the company was negligent in permitting the "hodge-porters" to come on its premises and wrangle over the luggage, it is difficult to see how it could have defended successfully.

The Supreme Court of Missouri, (Division No. 1.) in *Kingman v. Waugh*, 40 S. W. Rep. 884, has held the *St. Louis Daily Record* to be a "daily newspaper," Newspapers, Legal Notices within the meaning of the statutes relating to the publication of legal notices. That paper was described as follows: The *St. Louis Daily Record* "is printed and published in the English language in the city of St. Louis, Missouri, every day except Sunday; that said publication claims on the face of it to be a newspaper devoted to the courts, financial, real estate, building, and business interests of St. Louis; that it is delivered each week-day morning, by carrier, in the city of St. Louis, and in outlying districts of the city by mail; that the subscription price is printed plainly upon the paper, and is not nominal, but is adhered to; that it circulates throughout the city of St. Louis, and is not confined to any particular trade, or calling, or business interest. It circulates generally among the lawyers, real-estate dealers, bankers, brokers, money lenders, bond and stock dealers, real-estate speculators and other property-holders. It also circulates extensively among material-men and builders, and those interested in the construction of buildings and the improvement of real estate. It is taken to a considerable extent by merchants, grocers, packing houses, provision dealers, wine and liquor dealers, brewers, dry-goods merchants and commission merchants of the city of St. Louis. It contains daily

what is claimed to be a complete list of all conveyances of real estate within the city of St. Louis, and all deeds of trust, releases of deeds of trust, chattel mortgages, permits issued for improvements upon real estate, mechanics' liens, judgments and transcripts affecting real estate, which occurred the day previous to the publication; notices of all real estate to be sold by trustees under powers contained in deeds of trust; notices of sales of real estate by administrators, executors, commissioners, or by other judicial processes, both in the city of St. Louis and in St. Louis county. It contains a brief minute of the proceedings of the Circuit Court of the city of St. Louis, brief notices of all suits filed in said court, and the setting of such cases for trial. It also contains quotations of all principal stocks and bonds on the market in the city of St. Louis, notices of assignments, bills of sale, notices of business failures and notices of corporations formed in St. Louis. It also contains brief items of news of a general character. It contains a number of commercial advertisements, and the advertisements are not confined to any particular trade or business. It contains, from time to time, advertisements of a legal nature, such as notices of sales of real estate at auction, by trustees under deeds of trust, and notices of stockholders' meetings."

"It is a law of business that a manufacturer of any particular line of products is also a dealer in that product, and that in the course of his business he is frequently compelled by a multitude of orders which is beyond his capacity or by derangement of machinery or from other causes to become a purchaser of the material he manufactures. That when firms do so purchase, such purchases are within the scope of their line of business cannot successfully be contested." Accordingly, such a purchase by one partner binds the firm: *Bukley v. Wood & Co.*, (Superior Court of Pennsylvania,) 4 Pa. Super. Ct. 391.

The pledgor of a note retains an equitable interest therein; and hence, if the pledgee of a note deposited as collateral security refuses to sue upon it when it becomes due, a bill will lie by the pledgor to have the note collected, and the proceeds credited on his debt: *Baker v. Burkett*, (Supreme Court of Mississippi,) 21 So. Rep. 970.

When relied upon to support a defence of false representations, newspaper advertisements, handbills and printed prospectuses need not always be set out *in hanc verba, (et imagines;)* the rule requiring the setting out of papers must have a reasonable application: *Max Meadows Land & Improvement Co. v. Mendinhall*, (Superior Court of Pennsylvania,) 4 Pa. Super. Ct. 393.

Practice.
Affidavit
of Defence.
Setting out
Paper

A condition upon a cloak-room ticket issued by a railroad company that it "will not be responsible for any package exceeding the value of £10," protects the company from liability, not only for the loss of an article deposited in the cloak-room, but also for damage or injury thereto while in their custody: *Pratt v. South Eastern Ry. Co.*, (Queen's Bench Division.) [1897] 1 Q. B. 718.

Railroad
Company.
Cloak-room.
Exemption
from Liability

A judgment against a railroad company for a death occurring in the operation of the road cannot be regarded as a necessary operating expense, and is not entitled to priority of payment over a mortgage upon that ground: *New York Security & Trust Co. v. Louisville, E. & St. L. C. R. R. Co.*, (Circuit Court, Dist. Indiana,) 79 Fed. Rep. 386; though the death occurred before the appointment of a receiver: *Veatch v. American Loan & Trust Co.*, (Circuit Court of Appeals, Eighth Circuit,) 79 Fed. Rep. 471.

Mortgage.
Priority of
Judgment
for Death

The Court of Errors and Appeals of New Jersey has recently decided, that the entry of a *nolle prosequi*, by order of court, on motion of the prosecutor, does not discharge from liability the sureties on a recognizance conditioned that the accused will first appear, and stand to abide "the order and judgment of the court in the premises, and in the second place, will not depart the said court without leave," when it appears that he did depart the court without leave: *Weber v. State*, 37 Atl. Rep. 133.

Recognizance,
Discharge,
Nolle
Prosequi

The Supreme Court of Illinois has declared that the statute creating the state board of health does not give it the power to prescribe vaccination as a condition to admission to the public schools, that not being expressly mentioned in the act; and that when the right to attend school is given by statute to every child of proper age,

Schools,
Vaccination

and there is no express grant of authority to make vaccination a condition to attendance, neither boards of health nor school boards can require it, if small pox does not exist in the community, and there is no reason to apprehend that it is approaching the vicinity of the school, or is likely to become prevalent there: *Potts v. Breen*, 47 N. E. Rep. 81, affirming 60 Ill. App. 201.

The Supreme Court of Louisiana has lately held, in accordance with the general rule on the subject, that the relationship between a parent and child, (in this case a father and daughter,) makes it his legal and moral duty to advise her as he thinks best for her welfare, and gives rise to a qualified privilege in giving that advice; that this relation and the usual sympathy among the friends of both, to whom the father's statements are repeated, are such that the issue involved, when those statements are relied on as the ground of an action for slander, is not whether they were true, but whether the father honestly believed them to be true; and that when these statements are in reference to the character of one who sought the daughter in marriage, they are not actionable merely because untrue, but express malice must be proved: *Baysset v. Hire*, 22 So. Rep. 44.

An envelope, and a letter which is proved to have been inclosed in it, are so connected together that the envelope may be used to supply the name of one of the parties to the memorandum in writing required by the Statute of Frauds: *Pearce v. Gardner*, (Court of Appeal of England,) [1897] 1 Q. B. 688.

The Supreme Judicial Court of Maine, following what seems to be the drift of the Massachusetts cases, has lately held that the water power created by the erection of a dam, being intangible and potential merely, is not an element of taxable property, apart from that upon which it operates; and should therefore be estimated in connection with the mills which are run by it, and be taxed there, rather than with the dam which creates it, and the land covered by the water: *Union Water Power Co. v. City of Auburn*, 37 Atl. Rep. 331.

Emery, J., clearly points out the fallacy in the argument of the majority opinion, in a very forcible concurring opinion, in which, after showing that the owner of the land may often

acquire a practical monopoly of the water power of a stream, he goes on to say: "This monopoly, thus valuable, is an incident of the ownership of the land, and may often be the principal element in the value of the land. Large revenues may often accrue to the landowner solely from this monopoly. This monopoly, this revenue or chance of revenue from it, should be included in an estimate of the value of the land. The whole value of the land, with all these incidents, is to be assessed and taxed in the town in which the land is situated." He arrived at the same conclusion as the rest of the court, on the ground that the court below had done this.

In a case before the Supreme Court of Pennsylvania, *Haverford Loan & Bldg. Assn. of Phila. v. Dougherty*, 37 Atl. Rep. 179, a tenant in common obtained a loan, giving mortgage security on the entire property, and at his direction the mortgagee paid out of the loan a prior mortgage on the property, both supposing that the mortgagor was owner. On discovering the fact that he was only co-tenant with others, the mortgagee brought suit for subrogation and other equitable relief. The court below dismissed the bill; but this decree was reversed by the supreme court, which held that the mortgagor was entitled to contribution, and to subrogation to the mortgage paid off; and that the second mortgagee succeeded to this right of subrogation.

According to a recent decision of the House of Lords, there is no fiduciary relation between tenants in common of real estate, as such; and one tenant in common of real estate cannot impose upon his co-tenant an obligation of a fiduciary character by leaving the management of the property in his hands. Accordingly, one such tenant can purchase the property at a private sale by the mortgagees, though he pays only the exact sum due in respect of the principal, interest and costs, leaving the bulk of the purchase money on the security of the property: *Kennedy v. De Trafford*, [1897] A. C. 180, affirming [1896] 1 Ch. 762.

But one tenant in common cannot acquire the common property, when the sale is in pursuance of a scheme of the purchaser to get possession of the land: *Van Ormer v. Harley*, (Iowa,) 71 N. W. Rep. 241.

It is not actionable for defendant, who sells the same kind of goods as plaintiff, to threaten to discharge its employes if they trade with plaintiff, and to tell them that their pay checks, made good for merchandise at its store, and non-transferable, will not be received when they have passed through plaintiff's hands, though such threats have the result intended, of injuring plaintiff in his business: *Robison v. Texas Pine Land Assn.*, (Court of Civil Appeals of Texas,) 40 S. W. Rep. 843.

Tort,
Liability,
Injuring
Plaintiff's
Business

When the same trade-mark has been appropriately used without objection by each of the owners of two separate springs of water having the same medicinal qualities, they may jointly maintain an action to enjoin a third person from using the trade-mark: *Northcutt v. Turney*, (Court of Appeals of Kentucky,) 41 S. W. Rep. 21.

Trade-mark,
Infringement,
Waters

Kekewich, J., of the Chancery Division of the Supreme Court of Judicature of England, has recently ruled, that the principle announced in *Reddaway v. Banham*, [1896] A. C. 199, 204, 1896, that "nobody has any right to represent his goods as the goods of somebody else," has no limit as regards name, origin, honesty of manufacture or sale, or otherwise; and that a trader whose goods have acquired a reputation under a particular name can restrain the use of that name in any way whatever by a rival trader in connection with the latter's own goods, even though that reputation has been acquired by the exertions or enterprise of the rival trader as an importer and vender on behalf of the plaintiff: *Saxlehner v. Apollinaris Co.*, [1897] 1 Ch. 893.

Trade-Mark,
Deception

The Supreme Court of the United States, in four cases, *American Pub. Co. v. Fisher*, 17 Sup. Ct. Rep. 618, reversing 10 Utah, 147, and *Springfield City v. Thomas*, 17 Sup. Ct. Rep. 717, reversing 9 Utah, 426, *Salt Lake City Brewing Co. v. Fred. W. Wolf Co.*, 17 Sup. Ct. Rep. 717, reversing 10 Utah, 179, and *Salt Lake City v. Tucker*, 17 Sup. Ct. Rep. 717, reversing 10 Utah, 173, and overruling *Hess v. White*, 9 Utah, 61, 1893, has held, that the statute of the territory of Utah, (Comp. L. Utah, § 3371, as amended by Laws, 1892, p. 46,) which authorizes a verdict in all civil cases on the concurrence of nine members of the jury, is invalid, because it impairs the common-law right of

Trial by
Jury.
Majority
Verdict

trial by jury secured to litigants by the act of congress extending the constitution and laws of the United States over that territory, (9 Stat. at Large, 458, § 17,) and by the act providing that in territorial courts no party shall be deprived of the right of trial by jury in cases cognizable at common law, (18 Stat. at Large, 27, c. 80,) and the seventh amendment to the constitution of the United States.

This leaves still open the question as to the constitutionality of such a statute when enacted by a state legislature.

The Supreme Court of Nebraska has applied the familiar principle of following trust funds to the case of money stolen from a bank by its janitor; rejecting the doctrine which holds that property stolen by a mere servant, not entrusted with any fiduciary duties, cannot be thus recovered, and declaring it, with much reason, to be "indefensible on authority, and opposed to the enlightened policy of modern equity jurisprudence:" *Nebraska Nat. Bk. v. Johnson*, 71 N. W. Rep. 294.

The Supreme Court of Appeals of West Virginia, following its prior decisions, holds that petroleum oil in place is part of the land; and that its wrongful extraction by one lawfully in possession is waste, and an irreparable injury, which will be enjoined: *Williamson v. Jones*, 27 S. E. Rep. 411.

When a testator devises and bequeaths his real and personal property to his wife, on condition that in no case shall she give or bequeath one cent of said estate to any member of his family or any relative of her own, the condition is against public policy and void, being a restraint upon alienation: *Morse v. Blood*, (Supreme Court of Minnesota,) 71 N. W. Rep. 682.

When a will gives the estate of the testator in trust for the support of his wife and children, during her life, and after her death to their support, in the discretion of the trustees, until they are of age or marry, and, when all the children arrive at age or marry, to divide the estate among the children, and, in the event of no child or issue thereof, then to divide the estate among the brothers and sisters of the testator, a renunciation by the widow, and her election to take against the will, is equivalent to her death, for

the purposes of distribution: *Randall v. Randall*, (Court of Appeals of Maryland,) 37 Atl. Rep. 209.

When one who has been adjudged to be insane is offered as a witness, the inquiry for the court in the preliminary examination is limited to his understanding of the obligations of an oath and ability to comprehend the examination as a witness, and, if he can stand this test, the effect of his alleged insanity upon his credibility is for the jury: *Wright v. Southern Express Co.*, (Circuit Court, W. D. Tennessee, N. D.,) 80 Fed. Rep. 85.

The testimony of an insane person is to be rejected, if it appears that his mind is so affected by his disease that his testimony is unreliable: *Armstrong v. Timmons*, 3 Harr. (Del.) 342, 1841; *Livingston v. Kiersted*, 10 Johns. (N. Y.) 362, 1813; *Hartford v. Palmer*, 16 Johns. (N. Y.) 143, 1819; *Hoyt v. Adce*, 3 Lans. (N. Y.) 173, 1870; but if it appears that his insanity does not relate to the subject-matter of his testimony, and that he can give an intelligible account of the transaction in respect of which he is called upon to testify, his testimony should be received, its credibility being for the jury: *Fennell v. Tail*, 1 C., M. & R. 584, 1834; *Reg. v. Hill*, 5 Cox, Cr. Cas. 259, 1851; *District of Columbia v. Armes*, 107 U. S. 519, 1882; *Worthington v. Mcnecr*, 96 Ala. 310, 1891; *Walker v. State*, 97 Ala. 85, 1892; *Clements v. McGinn*, (Cal.) 33 Pac. Rep. 920, 1893; *Holcomb v. Holcomb*, 28 Conn. 177, 1859; *Mayor v. Caldwell*, 81 Ga. 76, 1888; *Tucker v. Shaw*, 158 Ill. 326, 1895; *Dickson v. Waldron*, 135 Ind. 507, 1893; *Mead v. Harris*, 101 Mich. 585, 1894; *People v. N. Y. Hospital*, 3 Abb. N. C. (N. Y.) 229, 1876; *Hand v. Burrows*, 23 Hun. (N. Y.) 330, 1880; *Coleman's Case*, 25 Gratt. (Va.) 865, 1874; *contra*, *Lopez v. State*, 30 Tex. App. 487, 1891.

Ardenus Stewart.

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PRINCIPAL AND AGENT; PRINCIPAL'S LIABILITY FOR AGENT'S DISHONESTY. In the case of *Knox v. Eden Musee American Co.*, 45 N. Y. Supp. 255 (May 7, 1897), it was decided that an employer is not negligent in not knowing or suspecting the dishonesty of an employe who has been in his service for several years and who has discharged his duties honestly and faithfully until within a short time before he left the service; and the employer is not liable to a third person whom the employe was enabled to defraud by virtue of his employment, though the dishonesty could easily have been detected by an inspection of the books of which the employe had exclusive charge.

An investigation of the facts in this case will show that the decision follows the general trend of the law. The agent acted clearly outside his authority when he pledged the stock certificates, which had been left in his charge for cancellation, for his own debt. His act was not in any way connected with his employer's business: *British Bank v. Charnwood Co.*, 18 Q. B. D. 714 (1878).

The principal is not bound to inform himself as to the manner in which the agent conducts his business, and to see that his instructions are obeyed. His neglect to do so is not ground of liability,

unless it induces those dealing with the agent to believe he had authority: *Wheeler v. McGuire*, 86 Ala. 398 (1889). The principal is not bound to supervise the conduct of the agent to see that he does not exceed his authority: *Schmidt v. Garfield National Bank*, 19 N. Y. Supp. 252 (1892). Whether or not the principal has used diligence in supervising his agent's work is a question for the court: *Manhattan Co. v. Lydig*, 4 Johns. 376 (1809).

Stock certificates fraudulently pledged by one who has them in his possession as a trustee may be recovered by the owner: *Shaw v. Seencer*, 100 Mass. 382 (1868). The owner of a non-negotiable note, past due, may recover it from one who has purchased it for value from the agent of the owner, where the latter was intrusted with it for a special purpose and fraudulently transferred it to the purchaser: *Weather's v. Smith*, 9 Tex. 622 (1853). Where a bookkeeper in a bank fraudulently entered moneys in the deposit-book of a dealer, which the latter had intrusted the bookkeeper to deposit, though this was outside of the latter's business, and the money not given in the bank or during banking hours, the bank was allowed to recover from the dealer for the deficiency in his account caused by the misappropriation by the bookkeeper, the bank having used the ordinary means of detecting any error in the books: *Manhattan Co. v. Lydig*, (*supra*).

The stock certificates were not negotiable and so the principal was not bound by the fraudulent act of the agent: *Mechanics' Bank v. N. Y., Etc., R. R.*, 13 N. Y. 599 (1856). The fraudulent issue of stock by the secretary of a corporation to himself, and afterwards pledged for his own debt, does not bind the corporation, and this even though the fraud was made possible by the officers of the corporation in signing blank certificates and leaving them with the secretary to be used as transfers: *R., N. O. & T. P. R. Co. v. Citizens' National Bank*, 24 Wkly. Law Bull. 198 (Cincinnati Super. Ct. 1891). Nor is a bank liable on notes left in a negligent manner so that they were stolen and the president's name forged thereon: *Salem Bank v. Gloucester Bank*, 17 Mass. 1 (1820). In general the misappropriation by an agent of his principal's fund for his own purposes does not bar the principal's right to recover, nor make him liable therefor: *First National Bank v. Oberne*, 121 Ill. 25 (1889); *Edwards v. Dooley*, 120 N. Y. 540 (1890); *First National Bank v. Tallaferra*, 19 At. 364 (Md. 1890); *Gerard v. McCormick*, 130 N. Y. 261 (1892); *Manhattan L. Ins. Co. v. Forty-second St., Etc., Co.*, 19 N. Y. Supp. 90 (1892).

CONSTITUTIONAL LAW; DUE PROCESS; PERSONAL PROPERTY; DOGS. In *Sentell v. N. O. & C. R. R.*, 17 S. C. Rep. 693 (April 26, 1897), the plaintiff sought to recover for the death of his dog, which was run over and killed by the defendant's electric car. The dog had not been placed upon the assessment rolls, and was, therefore, according to a certain statute of Louisiana, not entitled to the protection of the law. The plaintiff claimed that

the statute was unconstitutional as depriving him of his property without due process of law. On appeal, the Supreme Court of the United States held that property in dogs is of a qualified nature, and not perfected until the regulations prescribed by the State are complied with; that it is within the discretion of the legislature to say how far dogs are property, and that therefore the statute in question was constitutional, and the plaintiff could not recover.

It has long been recognized that there is no complete property in dogs as in beasts of burden, or as in those useful for food. At common law a dog is not the subject of larceny, but the taking of a dog is an invasion of property amounting to a civil injury, and redressed by a civil action: 2 Black. Comm. 393; 4 Black. Comm. 236. The right of civil action shows there is some property in a dog at common law which distinguishes him from animals *feræ nature*: *Ireland v. Higgins*, Cro. El. 126 (1592); *Wright v. Ramscot*, 1 Saund. 84 (1667). Such an action has been allowed in this country in the absence of any statute: *Dutton v. Mock*, 4 Dev. & Bat. (N. C.) 146 (1838); *Parker v. Mize*, 27 Ala. 480 (1855); *Whitely v. Harris*, 4 Sneed (Tenn.) 469 (1857); *Brent v. Kimball*, 60 Ill. 211 (1871); *Ten Hopen v. Walker*, 96 Mich. 236 (1893). But a criminal prosecution for larceny of a dog will not be allowed: *Ward v. State*, 48 Ala. 161 (1872); *State v. Holder*, 81 N. C. 527 (1879); *State v. Doe*, 79 Ind. 9 (1881); nor for a malicious injury to a dog: *State v. Marshall*, 13 Tex. 55 (1854). It has been held, however, that where a statute punishes the malicious injury of personal property, this includes injury to a dog: *State v. McDuffie*, 34 N. H. 583 (1857); *State v. Kinsman*, 77 Ind. 132 (1881). So a statute declaring that larceny includes the taking away of any personal property makes dogs the subject of larceny: *Harrington v. Miles*, 11 Kan. 480 (1873); *State v. Brown*, 9 Bax. (Tenn.) 163 (1876); *Mulhally v. Prople*, 86 N. Y. 365 (1881). In some States, on the other hand, it has been held that a dog is not included under the term "goods and chattels," and that the old common law rule as to larceny still exists: *Finlay v. Bear*, 8 S. & R. (Pa.) 571 (1823); *State v. Lynum*, 26 Ohio St. 400 (1875). In England it has been held that a dog is not a "chattel" under a statute providing punishment for obtaining chattels under false pretences: *Rogins v. Robinson*, 8 Cox C. C. 115 (1859). A statute punishing the killing of domestic animals has been held not to include a dog: *U. S. v. Gideon*, 1 Minn. 292 (1856); *State v. Harriman*, 75 Me. 562 (1884).

Following out the common law idea that property in dogs is not absolute, statutes ordering the killing of unmuzzled or unregistered dogs have been held within the police power: *Tower v. Tower*, 18 Pick. 262 (1836); *Haller v. Sheridan*, 27 Ind. 404 (1867); *Blair v. Forehand*, 100 Mass. 136 (1868); *Morewood v. Wakefield*, 133 Mass. 240 (1882); *Jenkins v. Ballantyne*, 8 Utah, 245 (1892). But such a statute does not authorize the conversion of

an unmuzzled dog to one's own use: *Cummings v. Perham*, 1 Met. (Mass.) 555 (1840); nor does it justify the killing of such a dog by another dog: *Heisrodt v. Hackett*, 34 Mich. 283 (1876). But in States where the common law has been changed by statute, and dogs have all the attributes of property, and are the subject of larceny, an order for the shooting of unmuzzled dogs is unconstitutional, as depriving a man of his property without due process of law: *Lynn v. State*, 25 S. W. 779 (Tex.) (1894).

As property in dogs is therefore of such an imperfect character and at common law protected only by civil action, in the absence of a statute making such property absolute the legislature has the right to prescribe the means by which that property right shall be perfected, and brought under the full protection of the law, and as it affords such means by registration when the owner thinks the property worth it, it may refuse the protection of the law to such property as, by omitting to register, he is deemed to consider worthless. The legislature, in the exercise of the police power, has provided, in the interests of the community, for the means of distinction between valuable dogs and dogs not worth preservation, and has placed the securing of the safety of his own property in the power of every owner.

EVIDENCE; PROOF OF PATERNITY. It has always been a difficult matter for the courts to determine how far evidence of resemblance between persons should be admitted to prove relationship. In *Copeland v. State*, 40 S. W. 589, Tex., (May 12, 1897), the appellant was tried for larceny, and her defense being that the money had been given her by the prosecutor for the support of her grandchild, she offered the six weeks' old child in evidence to prove that the prosecutor was the father. It was held that the child was too immature in development to be inspected by the jury in comparison with the prosecutor. As the same court had previously held, in *Barnes v. State*, 39 S. W. 684, Tex., (Mar. 24, 1897), that a child of three months old could not be offered for the same purpose, the decision could not well have been otherwise.

The general rule is that evidence of resemblance, as testified to by other persons, will not be received, as being only matter of opinion: *U. S. v. Collins*, 1 Cranch Circ. 592 (1809); *Keniston v. Ronce*, 16 Me. 38 (1839); *Eddy v. Gray*, 4 Allen, (Mass.) 435 (1862). In some States it is further held that the child cannot be brought before the jury for their inspection: *Risk v. State*, 19 Ind. 152 (1862); *State v. Danforth*, 48 Iowa, 43 (1878), disapproving of *Stumm v. Hummel*, 39 Iowa, 478 (1874); *People v. Corner*, 29 Hun, (N. Y.) 47 (1885); *Hanawalt v. State*, 64 Wis. 84 (1885); *Robnett v. People*, 16 Ill. App. 299 (1885); *Clark v. Bradstreet*, 80 Me. 454 (1888); *Overlock v. Hall*, 81 Me. 348 (1889). In most States, however, such inspection is allowed: *Gilmanton v. Ham*, 38 N. H. 108 (1859); *Finnegan v. Dugan*, 14 Allen, (Mass.) 197 (1867); *Paulk v. State*, 52 Ala. 427 (1875); *State*

v. Britt, 78 N. C. 439 (1878); *Gaunt v. State*, 50 N. J. L. 490 (1888); especially if there is a question of mixed blood: *Warlock v. White*, 76 N. C. 75 (1877). In most of the cases in which the inspection was refused, though the reasons were stated in general terms, it will be found that the child was too young for any supposed likeness to be a safe guide in the determination of its paternity. In *State v. Danforth* (*supra*), the child was only three months old; in *Clark v. Bradstreet* (*supra*), the child was six months old, and it was held the evidence was too vague, uncertain, and fanciful; in *Overlock v. Hall* (*supra*), the child was six months old; *Hanna-walt v. State* (*supra*) decided that a child less than a year old could not be admitted in evidence.

There seems to be no fixed age limit after which the child will be admitted. In *State v. Smith*, 54 Iowa, 104 (1885), where the child was two years old, the jury were allowed to inspect, as it was considered that the circumstances differed from those of *State v. Danforth* (*supra*). The court said: "Though resemblance often exists between persons who are not related, still what is called family resemblance is sometimes so marked as scarcely to admit of mistake. We are of the opinion, therefore, that a child of the proper age may be exhibited to the jury as evidence of alleged paternity."

The test of what is the proper age seems to be whether the child still retains the immaturity of features which render it unsafe for comparison; if so, as is plain in the case under discussion, it cannot be shown to the jury as evidence of paternity or other relationship.

MISTAKE; RIGHT TO RECOVER MONEY PAID UNDER MISTAKE OF LAW. That the doctrine denying the right to recover money paid under a mistake of law is no longer accepted in its entirety is instanced in a recent Pennsylvania case, *Comm. v. Lancaster County*, 6 District Reports (Pa.), 371 (June, 1897). The facts were that the Receiver of the Insurance Company collected various assessments from policy-holders, in some cases with, in some without, suit. The policies having been adjudged to be non-assessible, those who had paid sued to recover the amount of the assessments, their recovery being resisted on the ground that it was money paid under a mistake of law. After a searching analysis of the authorities, the Court of Common Pleas of Dauphin County, in a learned opinion, allowed a recovery, adopting the principle laid down by Lord Mansfield, in *Bize v. Dickason*, 1 T. R. 285 (1786), that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience ought, he cannot recover it back; but if money be paid under a mistake which there was no ground to claim in conscience, the party may recover it back. (This case will be noticed more fully when it reaches, as it probably will, the Supreme Court of Pennsylvania.)

WILLS; DEVISE TO ATTESTING WITNESS: *Davis v. Davis*,

Supreme Court of Appeals of West Virginia, 27 S. E. Rep. 323 (April, 1897). If a will can be proven independently of the testimony of an attesting witness beneficially interested therein, is a devise to such witness or her husband void? This is a question which the Supreme Court of West Virginia has lately answered in the negative. In the case in which this question arose, the validity of the will or the probate thereof was in no wise attacked,—it was simply claimed that because one of the devisees placed herself in the attitude of an attesting witness, she must be deprived of her interest. Section 18, c. 77, of the Code of West Virginia, has an important bearing on the issue, and is as follows: "If a will be attested by a person to whom or to whose wife or husband any beneficial interest in any estate is thereby devised or bequeathed, if the will may not be otherwise proven, such person shall be deemed a competent witness, but such devise or bequest shall be void, etc." The position of the appellants was that the attestation was valid, but that it was so for the reason that the disability of the witness to attest the will was taken away by destroying her interest therein, in other words that the attestation rendered the will void, and not the fact that the will could not otherwise be proved. The court said that this construction was plainly contrary to the intent of the statute, which clearly contemplated that no valid will should be held void in any of its provisions if established by disinterested testimony.

In the case of *Blake v. Knight*, 3 Curt. Ecc. 547 (1843), it was said: "The court is not bound to have positive affirmative evidence of the subscribing witnesses." In *Jesse v. Parker*, 6 Grat. 57 (1849), Judge Allen said: "The law does not prescribe the mode of proof nor that the will should be proved as well as attested by a specific number of witnesses. If such proof were to be required from each subscribing witness, the validity of wills would be made to depend upon the memory and good faith of the witnesses and not upon reasonable proof that all the requirements of the statute had been complied with." In the case of *Webb v. Dye*, 18 W. Va. 376 (1881), it was held, that a will must be subscribed but need not be proven by two attesting witnesses. So the will under consideration could have been, and was, fully established by the other attesting witnesses. It might have occurred that the will could not have been established without the testimony of this particular devisee, and in such a case to make her competent, as against the heirs of the testator, her beneficial interest would have to be avoided. It was contended by counsel for the appellant that the word competent related to the time of the attestation. If this were so, then a will attested by such person would be void although it might be otherwise proved. Following this argument to its logical conclusion, the will, though invalid in its conception, could be rendered valid by destroying all other means of proof except that of the interested attesting witness. The conclusion of the court was that an interested attesting witness merely ran the risk of losing

all beneficial right under the will by reason of the statutory provision. Such risk she had the right to take, and was not subject to forfeiture merely by reason thereof.

RIPARIAN RIGHTS; PRESCRIPTION. An interesting question arose in the case of *Smith et al. v. Youmans et al.*, (Supreme Court of Wisconsin,) 14 N. W. Rep. 1115 (April 30, 1897), as to the right of property owners whose lands have been overflowed by back water from a dam, to have the water maintained at the artificial level so produced.

Lake Keulah, the watercourse in question, had originally been a shallow, marshy, lake, but the grantors of the defendants had, more than forty years previous to the suit, closed the natural outlet of the lake and constructed a dam and an artificial overflow at another point, raising the level of the lake six feet above its natural height and completely submerging the marshy edges. The lands surrounding the lake thereupon became very valuable as sites for villas, country seats, and pleasure resorts.

The mill, for which the dam had been built, having been destroyed, the defendants removed the bulkheads for the purpose of drawing down the water in the lake for use in the stream below. The defendants asserted their right to decrease or increase the level of the lake free from any restriction, although by their act the marshy edges of the lake were exposed, rendering the neighborhood unhealthy and destroying the value of the lands as pleasure resorts.

The court held that the defendants had, by forty years user, obtained a prescriptive right to maintain the water of the lake at the original height of the dam and to overflow the plaintiffs' lands, and that the landowners had obtained a prescriptive right to have the water maintained at that level so long as the defendants retained their easement; that the rights of the parties were reciprocal and could be enforced by the one against the other. It appears that the defendants could escape their liability by abandoning their easement. Much the same question had been decided by the same court in the case of *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co.*, 79 Wis. 297; 48 N. W. 371 (1891); but in that case the natural level of a watercourse had been changed, while in the present case the change had been made in the artificial level. The court practically held that after forty years user the artificial pool became the natural level, and the same rules of law applied.

CONTRACTS; RESCISSION IN CASE OF FRAUD; RETURN OF BENEFITS. In *Stodder v. Southern Granite Co.*, 27 S. E. 174 (Ga.), Nov. 30, 1896 (first reported May 10, 1897), the plaintiff was injured by defendant's negligence. Afterwards, while still weak in body and mind on account of his injury, he was induced through fraud to sign a paper purporting to be in full settlement of all claim for damages. For this paper plaintiff received twenty dollars, which sum he alleged that he was utterly unable to repay.

Accordingly, he asked to be allowed to rescind the contract without returning its benefits. The court denied this request, (Atkinson, J. dissenting,) laying down the general rule as applying alike to fraudulent contracts and to those of parties mentally incapable.

The court followed the general rule,—a plaintiff desiring to rescind a fraudulent contract must offer and be willing to perform such acts on his part as will restore the defendant to the position which he occupied before the transaction: *Beach on Contracts*, §§ 792, 793, 8 Am. and Eng. Ency. of Law, 806; *Jopling v. Dooley*, 1 Yerg. (Tenn.) 289, 24 Am. Dec. 450 (1830); *Morrow v. Rees*, 69 Pa. 368 (1871); *Wolf v. Deutsch*, 75 Ill. 205 (1874); *Vanhier v. Johnson*, 4 Hun, (N. Y.) 415, 6 Thomp. & C. 648 (1875); *Herman v. Hoffeneger*, 54 Cal. 161 (1880); *Cates v. Bales*, 78 Ind. 285 (1881); *Vance v. Shorer*, 79 Ind. 380 (1881); *Baine v. Taylor*, 136 Ind. 138, 36 N. E. 269 (1893); *Rowden v. Achor*, 95 Ga. 243, 22 S. E. 254 (1894); *Duncan v. Humphries*, 58 Ill. App. 440, (Shepard, J., dissenting,) (1895); *O'Callaghan v. Lowles*, 66 Fed. Rep. 356 (1895); *Gassett v. Glazier*, 43 N. E. 193, 165 Mass. 473, at 480 (1896). But it has been held that no restitution is required of insane persons: *Gibson v. Soper*, 6 Gray, (Mass.) 279 (1856); *Crawford v. Scovell*, 94 Pa. 48 (1880); and that the rule is satisfied if the judgment will put the parties substantially in *statu quo*: *Allerton v. Allerton*, 50 N. Y. 670 (1872); and that the fact that the parties cannot be put precisely in their original condition will not preclude a decree for rescission: *Gatling v. Newell*, 9 Ind. 572 (1857). If the goods are necessarily destroyed in discovering the fraud, no return is necessary: *Poullon v. Lattimore*, 9 B. & C. 259 (1829); *Smith v. Love*, 64 N.C. 439 (1870).

BOOK REVIEWS.

COMMENTARIES UPON THE CONSTITUTION OF THE UNITED STATES
HISTORICAL AND JURIDICAL WITH OBSERVATIONS UPON THE
ORDINARY PROVISIONS OF STATE CONSTITUTIONS AND A COM-
PARISON WITH THE CONSTITUTIONS OF OTHER COUNTRIES. Three
Volumes. By ROGER FOSTER, of the New York Bar. Vol. I.
The Boston Book Company.

A careful and deliberate examination of this work, of which the first volume of more than seven hundred pages has been published, will satisfy the diligent student, judge or active practitioner, that it is a book of unusual merit and extraordinary value. Much was to be expected of the writer. His high and justly deserved reputation as an author of a *Treatise on Federal Practice*, his position as lecturer on Federal Jurisprudence at the Law School of Yale University, his inherited aptitude, as the son of a late member of the Supreme Judicial Court of Massachusetts, for the consideration of

the gravest of legal questions, his close relationship to the illustrious Roger Sherman, one of the Framers of the Federal Constitution, as well as his own keen interest as a scholar in the evolution of our national authority, and the many years of conscientious labor which he has expended upon politico-judicial problems, qualify him in an uncommon degree for the great task which he has undertaken. The partial result of his toil is before us. It is eminently satisfactory.

Mr. Foster approaches his subject in a true historical spirit. He is an original investigator. He explores and exhausts the sources and springs of information and authority. He accepts no statements at second hand. He is no slave of dogma. He brings no preconceived theories into view. He is not misled by great names or garbled extracts. He exhibits no partisanship. He strives as far as possible to ascertain the facts, and in doing so sifts the evidence with skill and discrimination. The facts, when found, are stated with boldness, irrespective of the effect such statement may have upon the favorite tenets of his readers. The reasoning that follows is calm and judicial. The result of such methods is a book remarkable for the care with which conclusions have been reached, and for breadth of view and liberality of spirit. The socialist will probably contest many of his positions, but will have difficulty in escaping from the overwhelming effect of the original evidence exhibited in the notes to the text. These notes are as worthy of close study as the text itself. They display the wide and varied range of the author's knowledge, and attest his diligence. They are not—as is too often the case—mere random head-notes, raked together as the farmer rakes his hay in the mow-field, but are in themselves the most convincing proof of the accuracy of the text. Very frequently an examination of authorities cited *in notes* will shake the faith of the student in the power of the text-writer to generalize with accuracy, or at times will convict him of error. With Mr. Foster it is otherwise. If a statement of his challenges scrutiny, it will be found that his view is not only fully justified, but demanded by the authorities. Historic accuracy has been aimed at and reached.

The large amount of matter, including original documents not elsewhere collected into one series, as well as the attention paid to the result of recent researches into the sources of the Constitution, and the scope of the powers intended by the Framers, are striking features. If a comparison be instituted between this work and the Commentaries of Mr. Justice Story—which a writer of those days predicted would prove the most useful and imperishable of his works—or with the chapters on 'The Jurisprudence of the United States in Kent's Commentaries, a justification will be found for the production of Mr. Foster's book. In brief, it is thoroughly up to date. However learned and diligent Story and Kent were,—and they were incontestably both—the truth is they were too near to the causes of the events they narrate to judge with accuracy, or to

describe with fullness. No man can give a trustworthy account of a battle whose eyes are filled with the smoke of conflict. The work must be done by one of a later generation. While the pages of Story and Kent are full of the charm which belongs to contemporaneous narrative, yet the truth is that many sources of information were fast-sealed to them. Their texts give but imperfect and partial glimpses, and no amount of judicious annotation can supply what is lacking. A chart published in 1820 cannot be relied upon by the geographical student of to-day. During the past fifty years, and particularly during the past fifteen, vast storehouses of knowledge have been opened. The activity of State Historical Societies, the publication of the reports of the debates in the Federal Convention and State Conventions, and of Memoirs, the discussions of scholars upon controverted points, the discovery of documents, the diligence of collectors of autograph letters, the newly awakened zeal of grandsons and great grandsons of the statesmen of the Revolution, the printing of Diaries, the clash of magazines, the collection and tabulation of forgotten plans for the Union of the Colonies, the rescue from oblivion of the newspapers and pamphlets and broadsides of the day, as well as the impetus given to all lego-historical studies by the recent works of Stubbs, Freeman, Hannis Taylor, Holmes, Pollock and Maitland, have made necessary as well as possible Mr. Foster's work. Modern methods of investigation are not only searching but thorough. They are conducted with boldness as well as patience. They are eminently philosophical and are satisfied with nothing short of the truth, if it be attainable by methods which are human. The passions, the prejudices, the narrowness and perversity of by-gone times are often repeated in the discussions of to-day, but clearer and bolder perceptions are the result. While no man can hope to escape wholly from error, or strip himself of individual sympathy with certain leading ideas or theories of interpretation, yet it is refreshing to find a scholar of lofty aims, ample knowledge, and calmness of legal judgment devoting himself to the task of collecting and arranging all that will throw light upon the meaning and the growth of our federal relations.

The phenomena of the present can only be understood by a study of the past. Surprises doubtless are in store for those who are prone to believe nothing but good of the Fathers of the Republic. Many great names must be tarnished, many motives must be questioned, many narrow and selfish views be exposed, many shifty means laid bare, in the midst of high purposes and noble acts. But the discovery that our fathers were but human, and that many of the statesmen of the past were as cunning and unscrupulous as the politicians of to-day, does not lessen our interest in the great problem of self-government, although it may lead to a more sober view of the achievements of the past, while it cannot but strengthen the faith of those who are striving to overcome the gigantic evils of to-day.

The introductory chapter well describes the anarchy preceding the Federal Convention and the bitter hostility to its work. It summarizes very fairly the conflicting views brought to light by the labors of Professor McMaster and Dr. Frederic D. Stone, of Philadelphia, and Paul Leicester Ford, Esq., of Brooklyn. In describing the previous attempts of the colonists at union, while relying on *Preston's Documents Illustrative of American History*, it overlooks the valuable compilation of Dr. Stone, entitled *Plans for the Union of the British Colonies of North America, 1643-1776*, published by Mr. Carson, of Philadelphia, in his *History of the One-Hundredth Anniversary of the Framing of the Constitution of the United States*. It claims originality for the work of the Federal Convention, and, in our judgment, sustains this claim, after due allowance for certain prototypes and models, and after giving due weight to the fact that written Constitutions existed in all the States.

The second chapter fully discusses the nature of the Constitution and the Preamble, and treats exhaustively of Nullification, Secession, and Reconstruction. While stating dispassionately the arguments on either side, and exhibiting much interesting original matter, covering all that is of permanent value in a historical relation to questions now fortunately settled, it states with happy brevity the principles which have been established by the adjudications of the Courts, the action of Congress and the Executive, the acquiescence of the States and the arbitrament of war: "The United States are a nation. The union is not a league, and cannot be dissolved except by a revolution."

The steps by which this conclusion is reached, the various stages of the great debate over the Preamble, the original sovereignty of the States, the formation of the Constitution, the methods of State ratification, the Alien and Sedition Laws, the Virginia and Kentucky Resolutions of 1798, the Ordinances of Nullification and Secession, together with mighty utterances of conflicting champions both in the Senate and on the bench, are dwelt upon in more than two hundred and fifty pages in a manner that leaves but little to be added or desired. The conclusion is incontestable. Though legal casuists may still differ, and solace themselves with shreds of arguments which are now of no practical utility, the student who delights in tracing effects to their proper cause will find all that is necessary to enable him to form a judgment of his own, while he cannot fail to be impressed with the fairness of treatment accorded to the "lost cause." The iron logic of events is quite as potent as that of pure dialectics, and the effects of the conflicts over slavery in the territories, the necessary and inevitable growth of the war powers in the suppression of an unfounded right of secession, as well as the centripetal tendencies of our modern life, aside from the Thirteenth, Fourteenth and Fifteenth Amendments, are pointed to as clinching the conclusion. Constitutional history, as well as judicial precedents, is expounded and explained. The reader must conclude that national power is a growth, natural, necessary,

inevitable and proper; fraught with some dangers, but curing many and much more dangerous evils.

Next in the order of discussion is a consideration of the three departments of the government, and of the distribution of its powers. It has become so trite to speak of the merits of maintaining the separation of the executive, legislative and judicial functions, that many do not know the interest which attaches to the history of this classification, nor the difficulty with which it has been maintained. The President has at times defied the Supreme Court, the Supreme Court has defied the President, and the Congress has defied both. Conflicts threatening to be serious have at times interrupted the harmony of our system, and various views have been entertained as to whether there was or was not an encroachment, or whether the encroachment was permanent. Even such an authority as Professor Woodrow Wilson believes that the independence of the departments is but "the literary theory of the Constitution," and that in point of fact Congress is supreme—a view shared in by Senator Lodge, and possibly by Mr. Justice Miller. This view seems to us surprising, especially in the face of the fact that the Supreme Court has exercised the power to declare acts of Congress unconstitutional, because of conflict with the Constitution, in twenty-one separate instances, and in relation to statutes of States and Territories in one hundred and eighty-two instances, of which a list, complete up to 1888, is to be found in the Centennial Appendix to Volume 131 of the United States Reports. We are prepared to adopt the view of Mr. Foster that at the end of the century we find the three departments still retain their balance, each with its prerogatives unimpaired.

The examination made by the author into the origin of the powers of Congress, based on the proceedings in the Convention as to its composition, followed by chapters on the term of members of the House of Representatives, the Right of Suffrage, the qualifications for Senators and Representatives, the apportionment of Representatives and direct taxes, the filling of vacancies, the powers and prerogatives of the Speaker and other officers of the House, the Constitutional provision relating to the Senate and its officers—all fully illustrated and sustained by notes which in themselves provoke interest and rivet attention—is admirable.

The most notable chapter in the book is that upon Impeachment, a subject which has never before been treated with such thoroughness, and which derives new interest from the recent attempt to impeach an Ambassador representing the United States at the Court of St. James. The history of the Constitutional provision is well stated and the reasons are given for the trial of impeachments by the Senate, the selection of that tribunal having been severely condemned. The defence rests upon the views of Hamilton in the *Federalist*, and Story and William Rawle in their well-known works on the Constitution. But little could be added. The special features of the chapter, however, consist in the account of the various impeachment proceedings actually conducted against a

Senator of the United States, a Judge of the Supreme Court, several United States District Judges, of President Johnson, and of a Secretary of War. These are followed by a consideration of the persons subject to impeachment, whether during or after the expiration of their office terms, of impeachable offenses, of convictions, of the causes for which Federal officers may be removed, and of the method of procedure, and the proceedings themselves in cases of actual impeachment. The Appendix contains a succinct history of State Impeachment Trials from Colonial days to the present time, and reveals much that is curious and "caviare to the general." The diligence displayed in the collection of the material for this Appendix, and the success which has attended it, are notable. Many rare publications are referred to—some of them but little known, or long forgotten.

In conclusion, Mr. Foster has given to the student a work from which he can derive an accurate and luminous conception of the origin and growth of our constitutional jurisprudence; to the judge a reliable guide to the original authorities, and the means of sustaining a judicial judgment upon broad and well established grounds; to the statesman an opportunity of seizing in short time and in due order upon the underlying principles of our government, and to the practitioner, summoned to defend causes involving questions of national importance, an armory from which he may readily draw his weapons of defence.

H. L. C.

THE FEDERAL COURTS; THEIR ORGANIZATION, JURISDICTION AND PROCEDURE. By CHARLES H. SIMONTON, United States Circuit Judge. Richmond, Va.: B. F. Johnson Publishing Co. 1896.

Judge Simonton, of the United States Circuit Court of the Fourth Circuit, has collected and revised five lectures delivered by him before the Richmond Law School, upon the Organization, Jurisdiction and Procedure of the Federal Courts. His purpose, as defined by himself, was "to take up each of these courts, and in a practical way, to ascertain its jurisdiction and explain its procedure."

His large practical experience with the questions involved peculiarly fitted him to deal with the subject, and he has stated with great clearness the rules which are to govern the practitioner in dealing with questions of jurisdiction and in framing the procedure to be followed.

After a brief examination of the effect of the common law upon his subject, the learned author describes the courts in turn, giving first the original jurisdiction of each, and then, where it exists, its appellate jurisdiction. The discussion of the removal of causes is clear and comprehensive. Procedure and practice at law and in equity are next considered, his treatment of the latter subject being very satisfactory. The criminal jurisdiction of the Federal Courts

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TREATISES.

DOMESDAY BOOK AND BEYOND. THREE ESSAYS IN THE EARLY HISTORY OF ENGLAND. By **FREDERIC WILLIAM MAITLAND, LL.D.**, Downing Professor of the Laws of England in the University of Cambridge, of Lincoln's Inn, Barrister-at-law. Boston: Little, Brown & Co. 1897.

PROBATE REPORTS ANNOTATED. Containing recent cases of general value, decided in the courts of the several States on points of probate law. By **FRANK S. RICE**, author of *American Probate Law and Civil and Criminal Evidence*. Vol. I. New York: Baker, Voorhis & Co. 1897.

THE ELEMENTS OF JURISPRUDENCE. By **THOMAS HESKINE HOLLAND, D.C.L.** Eighth Edition. Revised. New York: The MacMillan Co. 1896.

THE ANNUAL ON THE LAW OF REAL PROPERTY. Edited by **TILGHMAN E. BALLARD**, and **EMERSON E. BALLARD**. Vol. IV. 1895. Crawfordsville, Ind.: The Ballard Publishing Co. 1897.

GENERAL DIGEST, AMERICAN AND ENGLISH. No. 3 to April, 1897. Rochester, N. Y.: Lawyers' Co operative Publishing Co.

COMMENTARIES ON THE LAWS OF ENGLAND. Four Volumes. By **SIR WILLIAM BLACKSTONE**. Edited by **WILLIAM DRAPER LEWIS, PH.D.**, Dean of the Department of Law of the University of Pennsylvania. Philadelphia: Rees Welsh & Co. 1897.

THE NEGOTIABLE INSTRUMENTS LAW, AS ENACTED BY THE LEGISLATURES OF NEW YORK, CONNECTICUT, COLORADO AND FLORIDA, FROM THE DRAFT PREPARED FOR THE COMMISSIONERS ON UNIFORMITY OF LAWS. By **JOHN J. CRAWFORD**, of the New York Bar. New York: Baker, Voorhis & Co. 1897.

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No. 9.

THE PRINCIPLES OF THE LAW RELATING TO CORPORATE LIABILITY FOR ACTS OF PRO- MOTERS.

PART I.

PROMOTERS: THEIR RELATIONSHIPS AND LIABILITIES.

CHAPTER I.

§ 1. *Who are promoters.*

It may be said, generally, that any person who does an act with reference to the formation of a company or in aid of its organization is, as regards that act, a "promoter" of the company. As the term originated in trade and not in the law no technical legal definition is possible, but it has been well described in the following manner: "In the law relating to corporations, those persons are called 'promoters' of a company who first associate themselves together for the purpose of organizing the company, issuing its prospectus, procuring subscriptions to the stock, securing a charter, etc."¹ Or as was said by Bowen, J.,² it is a term, "usefully summing up in a single word a number of business operations familiar to the commercial world, by which a company is generally brought into existence."

¹ Black's Law Dictionary.

² *Whaley Bridge Calico Printing Co. v. Green*, L. R. 28, Q. B. D. 351.

The only requisite, therefore, to bring one within the meaning of the term is, that he shall have performed some act with a view to the formation of a company. As to what acts are usually done in the projection or floating of a corporation, is more a matter of business experience than of law, but among the most usual and necessary might be mentioned (those to which reference has already been made), viz., the issuing of the prospectus, inducing others to subscribe for stock, and obtaining the charter.

§ 2. *Relationship between corporations and their promoters.*

Now, although any act done with reference to the creation of a company will constitute one a promoter, it does not follow that a status is created. The relationship thereby established has no significance except as regards the act done. That is to say: with respect to that act, the one doing it is a promoter and subject to all the rights and liabilities which that term implies; but if he should subsequently abandon the enterprise he could not be held for acts done after his connection with the project had ceased, on the broad ground that he was a promoter of the company.

What rights and liabilities, then, does this term imply? Promoters are universally held to be corporate fiduciaries, standing in a relation of trust and confidence towards the projected company and the stockholders, and bound to exercise *uberrimam fidem* towards both.¹ This arises from the fact that promoters usually hold themselves out as deeply interested in the proposed corporation, and as acting for it. They take upon themselves to bring into existence this creature of the law which, in its inchoate state, is completely at their mercy, unprotected by impartial agents acting solely for the benefit of the stockholders. In view of these circumstances, the acts of the promoters are strictly scrutinized.² Since they

¹ *Denamore Oil Co. v. Denamore*, 64 Pa. 43 (1870); *Chandler v. Bacon*, 30 Fed. 538 (1887); *Emma Silver Mining Co. v. Grant*, L. R. 11 Ch. Div. 918 (1878); *Simons v. Vulcan Oil & Mining Co.*, 61 Pa. 202 (1869); *McElbenny's App.*, 61 Pa. 188 (1869); *Bagnell v. Carlton*, L. R. 6 Ch. Div. 376 (1877).

² *Sombrero Phosphate Co. v. Brianger*, L. R. 3 App. Cas. 1218.

stand in a trust relation, they are prohibited from making any profit other than is common to all the stockholders, or receiving any secret advantage whatsoever, and this relation exists even in favor of those who subsequently become stockholders.¹

The results of the cases on this question may be summed up in four propositions :

(1.) Where a promoter buys property intending to sell it to the company (already in process of formation) he cannot make a profit on the transaction without the fullest disclosure.²

(2.) But where one owns property he is at liberty to form a company and sell to it at any price and without disclosing his profit : provided, only, however, that he make no fraudulent misrepresentations.³

(3.) Where one buys property and soon after begins to promote a company, and declares that he bought the property for the company, and effects a sale to the company, he is liable for any profit made, on the ground that he has alleged that he acted as an agent in the matter, and may not now be heard to claim that he acted only for himself.⁴

(4.) If a promoter receive a gift or commission from the vendors of property for arranging a sale to the company, he must account therefor (less the amount of his disbursements) for he may not secretly derive any benefit over the other members in any transaction to which the intended company is a party.⁵

It results also from this trust relation that if the project fails, the promoters are bound to return the subscriptions to the stockholders, and failure to do so renders them liable as for a misuse of trust funds.⁶

It is evident from these results that this relation is of a fiducial character and is similar to that existing between trustee and *cestui que trust*, principal and agent, or partner and

¹ *Densmore Oil Co. v. Densmore*, 64 Pa. 43 (1870).

² *Emma Silver Mining Co. v. Grant*, L. R. 11 Ch. Div. 918 (1878).

³ *Densmore Oil Co. v. Densmore*, 64 Pa. 43 (1870).

⁴ *Simons v. Vulcan Oil Co.*, 61 Pa. 202 (1869).

⁵ *Emma Silver Mining Co. v. Grant*, L. R. 11 Ch. Div. 918 (1878).

⁶ *Nockles v. Crosby*, 3 B. & C. 814.

partner. In fact, in *Bagnell v. Carlton*,¹ the Court treats of the promoters as trustees; Lord Cotton, in the same case, deals with them as agents of the company; and Sharswood, J., in the leading case of *Densmore Oil Co. v. Densmore*,² draws an analogy between the position of promoters in respect of the company, and the relations of partners *inter se*.

In deciding as to whether promoters were liable to turn over to the company secret profits, he said: "It is a familiar principle of the law of *partnership*, that one partner cannot buy and sell to the partnership at a profit; nor if a partnership is in contemplation merely, can he purchase with a view to a future sale without accounting for the profit." And on this ground he rested the decision.

It is a mistake, however, to suppose that the analogy is perfect as between promoters and either trustees, agents, or partners. Strictly speaking, a promoter is none of these, but occupies a position in respect of which the law imposes certain duties similar to those imposed in the other instances. If one may use the term, it is a quasi-agency or trusteeship.³ The subject becomes of practical importance only with regard to the suggestion, that the promoters are agents of the company.

It is clear that if a promoter is treated as a technical agent, then the corporation must be held liable for the promoters acts done within the scope of his agency. That there cannot be an agent when no principal is in existence seems equally clear. We shall later have to discuss a line of cases in which it was held that a technical agency exists, but reason and the great weight of authority are against the proposition, and for the present it is sufficient to say that the idea has been thoroughly discredited.⁴ The relationship, therefore, between the promoter and the company is that of corporate fiduciary, and is similar in its obligations to that of trustee or agent.⁵

The relationship ceases to exist when the corporation comes into being, though it has been suggested that, even after

¹ 6 Ch. Div. 371 (1877).

² 64 Pa. 43 (1870).

³ *Chandler v. Bacon*, 30 Fed. 538 (1887).

⁴ See *infra*.

⁵ *Chandler v. Bacon*, 30 Fed. 538 (1887).

incorporation, those engaged in placing the stock may still be called promoters.¹

§ 3. *Relationship of promoters inter sese.*

It is very generally stated in America that the projectors of a company are partners, and that their mutual rights and duties are determined by the law applicable to partnerships.² In England, however, the theory obtains that the promoters do not necessarily stand in this relation to each other, though they may do so under certain circumstances. The actual position which they occupy in any given case is a question of fact for the jury.³

Under the American rule, it is logically held that one promoter cannot recover from another for anything due on account of the formation of the company, in analogy to the familiar doctrine of partnerships that one partner cannot recover from another for anything due on account of the partnership business.

While the American doctrine thus broadly stated has undoubtedly a just application in certain cases, it must not be taken to mean that anyone who shall have done some act with reference to the formation of the company, and thereby become as to such act a promoter, is the partner of all others who have similarly acted, and therefore liable to be charged for their acts. Such a result would be unjust and could subserve no good purpose. The rule must be understood to provide that all those who act jointly in any transaction or series of transactions with respect to the corporate formation, are, in so doing, partners. The case of *Witmer v. Schlatter*⁴ was one in which the doctrine of partnership was held applicable. That was an action of assumpsit brought against Schlatter and one hundred and seventy-six others as partners, who under the title of the "Contracting Committee of the Phila. &

¹ *Bramwell, J.*, in *Tuytens v. Grant*, 2 C. P. Div. 303.

² *Redfield on R. R.*, p. 11, § 3; *Witmer v. Schlatter*, 2 Rawle, 329 (1831); *Roberts Mfg. Co. v. Schlich*, 64 N. W. 886 (Minn. 1895); *Smith v. Warden*, 86 Mo. 399.

³ *Milburn v. Codd*, 7 B. & C. 419, a. c. 1 M. & R. 238.

⁴ *Rawle*, 329 (1831). See also *Brewster v. Hatch*, 25 N. H. 305 (1850).

Pittsburgh Transportation Co." were carrying on business intending to become incorporated. They authorized one Harper to enter into a contract with the plaintiff in behalf of the corporation afterwards to be formed. Suit was brought against the individual members and a plea in confession and avoidance entered by some of the defendants.

Gibson, C. J., held: "Against those who pleaded, the record is undoubtedly that all who were alleged to be partners are so in fact; but, although the fact of partnership may be established by the separate admissions of all, it cannot be by the admissions of less than all, for the plain reason that a confession is competent to effect none but him who made it." "We are, therefore, of opinion that the parties to the contract are personally liable; but for the insufficiency of the evidence of partnership as to some of the defendants, a new trial is awarded."

The rule having been misinterpreted, however, the court, in *Railroad Gazette v. Wherry*,¹ said: "It cannot be contended that anyone who participates as a projector in the organization of a proposed corporation, can be held individually liable for every contract which any other projector sees fit to make in the name of the contemplated corporation, although such contract is made without the authority, sanction or knowledge of the party sought to be held liable."²

It would seem, therefore, that any liability to be charged upon a promoter, for the acts of his fellow promoters, must rest rather upon the principles of agency than of partnership,³ though wherever the promoters have entered into such relations that the elements of a partnership are present, all the consequences of such a relation follow, and the act of one done within the scope of the undertaking binds all,⁴ and each must act with entire good faith as regards the others.⁵ Under any other circumstances, however, there is no relation of

¹ 58 Mo. App. 423 (1894).

² See also *Johnson v. Corser*, 25 N. W. 799 (Minn. 1885).

³ *Hurt v. Salisbury*, 55 Mo. 316 (1874); *Beach on Corps.*, § 185.

⁴ *Brewster v. Hatch*, 25 N. E. 305 (1890).

⁵ *Densmore Oil Co. v. Densmore*, 64 Pa. 43 (1870).

confidence between the promoters, and they may deal with each other at arm's length.¹

This being so, the distinction attempted to be drawn by some writers between the English and American theories as to the relationship existing between the promoters *inter sese*, would seem to be of little practical importance, as there is a substantial uniformity in the results reached.

§ 4. *Personal liability of promoters for contracts made in the corporate name.*

Having considered the relationship in which promoters stand to the corporation and to each other, it remains to inquire how far they become personally responsible for their acts done, or contracts made, in behalf of the corporation which they have undertaken to create. And, first, it may be taken as self-evident, that where the contract is not in fact made on the faith of the corporation, but with the promoter personally, even though it were intended for the benefit of the future company, the promoter is individually liable; for the engagement is his own.²

A corollary to this proposition is that where the contract on which a plaintiff is attempting to hold a projector personally liable, was made expressly between the plaintiff and the intended company, the plaintiff assuming the risk that such a company would be formed, and that when it came into existence it would bear the burden, and pay the plaintiff's claim, no responsibility rests upon the promoter.³

In *Whitney v. Wyman*,⁴ the defendant and others, describing themselves as the "Prudential Committee of the Grand Haven Fruit Basket Company," wrote to Whitney stating that the company was partially organized, that certain machinery would

¹ *Denamore Oil Co. v. Denamore*, 64 Pa. 43 (1870).

² *Ruby Chief Mining Co. v. Gurley*, 29 P. 668 (Colo. 1892); *Perry v. Little Rock, Etc., R. R.*, 44 Ark. 383 (1884); *Carmody v. Powers*, 26 N. W. 801 (1886); *Wilbur v. N. Y. Co.*, 12 N. Y. Supp. 456; *Heleca Gold Mining Co. v. O'Neill*, 19 N. Y. Supp. 592.

³ *Whitney v. Wyman*, 101 U. S. 392. See *contra* (an old case) *Farnival v. Coombs*, 5 M. & G. 736; *Landman v. Rutwistle*, 7 W. H. & G. 632.

⁴ 201 U. S. 392.

be needed, and ordering the machinery in the name of the company. Whitney addressed his reply to the "Grand Haven Fruit Basket Company," stating that the machinery was in process of construction. The goods were charged on the plaintiff's books to the company, but no payment having been made he sued the members of the committee personally.

Swayne, J., held that there could be no recovery, saying: "It seems to us entirely clear that both parties understood and meant that the contract was to be, and in fact was, with the corporation and not with the defendants individually."

In *Landman v. Entwistle*,¹ Parke, B., said: "It is clear that plaintiff undertook to do the work, not upon a contract with the provisional committee, but looking to the chance of the scheme succeeding and of there being funds available for the payment of his claim."²

In the absence of any express stipulation of this sort, exempting the promoter from liability, he is responsible for all acts done or contracts made by him or with his authority, though they were so done or made in the name of the corporation;³ and this is so whether the proposed corporation is never formed,⁴ or fails,⁵ and even though incorporation were completed and the company had made itself responsible.⁶ In the latter case the plaintiff has a choice of remedies against the promoter or the company,⁷ for the reason that the action of the company by which it becomes bound is in effect the making of a new contract, and that therefore the original agreement between the plaintiff and the promoter is unaffected.⁸

The cases under this head may be divided into two classes:
(1.) Those in which the party contracting with the promoter

¹ 7 W. H. & G. 632.

² See also *Hersey v. Tully*, 44 P. 854 (Colo. 1896).

³ *Fredendall v. Taylor et al.*, 26 Wis. 286 (1860).

⁴ *Johnson v. Corser*, 25 N. W. 799 (Minn. 1885).

⁵ *Roberts Mfg. Co. v. Schlich*, 64 N. W. 826 (Minn. 1895); *Hurt v. Salisbury*, 55 Mo. 316 (1874); *Weatherford R. R. v. Granger*, 24 S. W. 795 (Texas, 1894); *Kerridge v. Hesse*, 9 Car. & Payne, 200.

⁶ *Queen City Furniture Co. v. Crawford*, 30 S. W. 163 (Mo. 1895).

⁷ *Scott v. Ebury*, 36 L. J. C. P. 161.

⁸ *Queen City Furniture Co. v. Crawford*, 30 S. W. 163 (Mo. 1895). See discussion, *infra*.

believed that the corporation, in whose name the contract was made, was in existence. (2.) Those in which he knew that the corporation was in process of formation only. Let us consider the grounds upon which the promoter's liability rests, in connection with each of these classes separately.

(1.) Where the promoter has not disclosed the inchoate condition of the company in whose name he contracts, he may be held liable for breach of warranty of authority, on the ground that where one contracts as agent he impliedly warrants that he has authority from his principal so to act. To have such authority is manifestly impossible where the principal is not yet in existence.¹ He can also be held liable on the further ground that, "where an alleged principal could not have authorized the contract, then it is plain from the beginning that the contract can have no operation at all unless it binds the professed agent. It is construed accordingly *ut res magis valeat quam pereat*, and he is held to have contracted in person."²

(2.) It would seem that it is this latter principle alone which can be applied where the projector has disclosed the incomplete condition of the company, or that fact has become known to the other contracting party through extraneous sources.

§ 5. *Liability for torts.*

Manifestly, promoters should be held liable for torts committed in the formation of a corporation, as in any other transaction, and it has accordingly been held that they are liable in deceit for false representations made to induce subscriptions to stock.³

§ 6. *Recapitulation.*

From the foregoing discussion it may be concluded, that while promoters stand in a position of trust towards the company, they are technically neither trustees nor agents, and that unless they expressly stipulate against personal liability on their contracts they will be liable, although said

¹ Bishop on Contracts, § 100; Collins v. Wright, 7 E. & B. 301.

² Pollock on Contracts, * 107.

³ Gerhard v. Bates, 2 El. & Bl. 476.

contracts be made in the name and for the benefit of the proposed corporation, and in spite of the fact that the corporation receives the benefit and assumes the obligation.

PART II.

THEORIES UPON WHICH THE CORPORATE LIABILITY HAS BEEN ENFORCED.

CHAPTER II.

THE COMPANY NOT LIABLE FOR ACTS OF PROMOTERS.

§ 1. *Of the rule generally.*

It may be safely said that the rule is now universally established, that a corporation cannot be bound by the acts of its promoters, *qua* promoters, before it comes into existence. A very carefully considered decision in which this conclusion is reached, and a case typical of the American authorities, is that of *Weatherford, Etc., R. R. v. Granger*.¹ The Court there says: "There are some propositions affecting this question upon which the authorities seem to be in substantial accord. A promoter, though he purport to act on behalf of the projected corporation and not for himself, cannot be treated as agent, because the nominal principal is not then in existence; and hence, where there is nothing more than a contract by a promoter in which he undertakes to bind the future corporation, it is generally conceded that it cannot be enforced."

The reason here given is the fundamental one upon which the rule rests, and in view of the unanimity of the decisions upon the point, a further discussion would seem to be unnecessary.²

¹ 24 S. W. 795 (Texas, 1894).

² In re Empress Engineering Co., 16 Ch. Div. 125 (1880); In re Northumberland Avenue Hotel Co., 33 Ch. Div. 16 (1886); Perry v. Little Rock, Etc., R. R. Co., 44 Ark. 383 (1884); Marchand v. Loan and Pledge Assn., 26 La. Ann. 389 (1874); Davis & Rankin v. Maysville Creamery Assn., 63 Mo. App. 477 (1895); Western Screw Co. v. Comaley, 72 Ill. 534 (1874); In re Hereford Iron Works Co., L. R. 2 Ch. Div. 621 (1876); Gunn v. Assurance Co., 12 C. B. N. S. 694 (1882); Hawkins v. Gold Co., 52 Cal. 513 (1877); Morrison v. Gold Co., 52 Cal. 306 (1877); Pittsburgh

It was, indeed, suggested in *Al'Dermott v. Harrison*,¹ that "the rule that the promoters cannot bind a corporation subsequently to be formed," does not apply to private corporations, but only to those exercising a franchise of a public or *quasi* public character. As the case relied on by the Court as authority for this proposition² was a suit between two former promoters of a company, on a contract made with regard to the future management thereof (they being the sole proprietors), and as the company was in no way implicated in the action, and the decision was merely that such a contract was not illegal as purporting to regulate the action of the intended company, the suggested distinction seems to be without the support of authority. It has not been followed elsewhere.

§ 2. *Rule not applicable where there is a de facto corporation.*

If, instead of a case in which a promoter has acted for an inchoate company, one is supposed in which a *de facto* corporation has acted in its own behalf, the question may arise whether if the body subsequently discovered the defect in its organization and completed the quota of the statutory requirements, the duly incorporated company becomes bound by the acts of the *de facto* organization.

It would seem that there can be no objection in theory or

& Tenn. Copper Co. v. Quintrell, 20 S. W. 284 (Texas, 1892); Huron Printing Co. v. Kittleson, 57 N. W. 233 (S. D. 1894); Schreyer v. Co., 43 P. 719 (Oregon, 1896); Stowe v. Flagg, 72 Ill. 397 (1874); Weatherford R. R. Co. v. Granger, 24 S. W. 795 (Texas, 1894); Arapahoe Co. v. Platt, 39 P. 584 (Colo. 1895); Long v. Citizens' Bank, 29 P. 878 (Utah, 1892); Battelle v. Cement Co., 33 N. W. 327 (Mo. 1887); Buffington v. Bardou, 30 N. W. 776 (Wisc. 1891); McArthur v. Printing Co., 51 N. W. 216 (Minn. 1892); Joy v. Manion, 28 Mo. App. 35 (1887); Hill v. Gould, 129 Mo. 106 (1895), *dictum*; Stowe v. Flagg, 72 Ill. 397 (1874); Gent v. Ins. Co., 107 Ill. 652 (1883); Franklin Fire Ins. Co. v. Hart, 31 Md. 60 (1869); Munson v. R. R., 103 N. Y. 58 (1886); Heleca Gold Co. v. O'Neill, 19 N. Y. Supp. 592 (1892); Rogers v. Texas Land Co., 134 N. Y. 197 (1892); Oakes v. Cattaraugus Co., 143 N. Y. App. 430 (1894); Burden v. Burden, 4 N. Y. Supp. 499; Payne v. Coal Co., 10 Exch. 281 (1854); Calodonian R. R. v. Helensburg, 2 Macq. H. of L. 393 (1856).

¹ 9 N. Y. Supp. 184 (1890).

² Lorillard v. Clyde, 86 N. Y. 384.

upon grounds of policy to holding the company liable. The rule under discussion has no application, for it refers merely to corporations not *in esse*. In contemplation of law, however, a *de facto* company has an actual existence as a corporation, and the fulfilment of the formal requisites adds nothing to the corporate vitality, nor does it in any true sense change the constitution or character of the body. The act of one was in all fairness and equity the act of the other. So it has been held that, under such circumstances, the company after due organization, is bound by its previous acts, for the acts are its own and not those of mere promoters.¹

§ 3. *Company bound where the charter so provides.*

It has been decided, and there are numerous dicta to the same effect, that if the charter provides that a contract made by promoters of a company shall be binding upon it, or if the charter gives to the promoters power to bind the corporation, and they exercise the power so given before organization is completed, then in either event the corporation upon coming into existence will be bound.

The case of *Tilson v. Town of Warwick Gas Light Co.*,² was an action of debt brought by the attorneys who had obtained the act incorporating the defendant company. The act provided that all costs of procuring it should be paid and discharged by the company. Bayley, J., said: "Now, where an Act of Parliament casts upon a party an obligation to pay a specific sum of money to particular persons, the law then enables those persons to maintain an action of debt," and judgment was thereupon rendered for the plaintiff³

It is to be noted that the Court treats of the obligation of the defendant as one created by statute, and not as resting

¹ *Wood v. Wheelen*, 93 Ill. 133 (1879).

² 4 B. & C. 961 (1825).

³ See also *Gent v. Merchants Ins. Co.*, 107 Ill. 632 (1883); *Munson v. Ry. Co.*, 103 N. Y. 53 (1886); *Preston v. R. R. Co.*, 5 H. of L. 605 (1896); *In re Rotherham*, L. J. N. S. 219; *Low v. R. R. Co.*, 45 N. H. 325 (1864); *Ely v. Ann.*, 34 L. T. N. S. 190; *Caledonian Ry. Co. v. Helensburg*, 2 Macq. H. of L. 393 (1856); *Touche v. Metropolitan Ry. Co.*, 6 Ch. App. 671 (1870); *Hill v. Gould*, 129 Mo. 106 (1895); *Weatherford R. R. v. Granger*, 24 S. W. 795 (Texas, 1894).

upon the intention of the parties or the circumstances of the case. It is the force of the statute that obligates the company to make payment, although it is the contract made with the promoter that allows the plaintiff to bring his action in debt for a specific sum, rather than in the form of a *quantum meruit*, for the reasonable value of the services rendered. The case does not decide, therefore, that any liability would exist in the absence of statutory provision.

The American cases cited in the note usually treat of the obligation as resting upon the intention of the parties or the circumstances of the case, and give effect to the charter provision merely as allowing a recovery against the company. Such recovery would otherwise be denied, on the ground that the rights of shareholders would be impaired by permitting it, as they had no notice of these claims for services rendered prior to incorporation. The obligation exists under such a view independent of the charter, and there is no objection to enforcing it when the charter has protected the rights of innocent third parties taking stock, by warning them of the incumbrances upon the property which they are about to purchase.

It is held in England that the mention of the contract in articles of association, or even a statement contained therein that one of the objects for which the company is to be formed, is the payment of the plaintiff's claim, do not bind the corporation as do like provisions contained in the charter.¹ It would seem that the distinction drawn must be based upon the fact that the charter being an Act of Parliament is obligatory irrespective of contract, while the articles of association constitute at most only an agreement between the parties to them.

It would seem that from the point of view adopted by the American courts, as to the purpose and effect of such provisions, that articles of association duly recorded according to statute, should put purchasers of stock upon notice of prelimi-

¹ In re *Empress Engineering Company*, 16 Ch. Div. 125 (1880); *Howard v. Patent Ivory Mfg. Co.*, L. R. 38 Ch. Div. 156 (1886); In re *Rotherham*, L. J. N. S. 219; *Ely v. Association*, 34 L. T. N. S. 190.

nary expenses incurred in the formation of the company, as effectively as would a charter.¹

§ 4. *Suggestion that company bound where all the projectors have contracted.*

It has been suggested (though what was said in the case was purely dictum) that, where all the stockholders of a corporation were parties to a contract made before organization, the company should be liable in equity upon the contract, on the ground that in substance, at least, the contract was made by the company itself.²

This theory, if permissible at all, could only be applied where no strangers to the contract had, subsequent to it, become interested in the corporation; for otherwise those would be charged who had no part in the transaction.³ Since such a rule overlooks the distinction between the corporation and its members, there would seem little reason for its adoption, and, indeed, it has been expressly repudiated in at least two well-considered cases.⁴

§ 5. *Doctrine that corporation is in esse when charter granted but no organization has taken place.*

It has also been suggested that if, under a general incorporation law, articles of association have been taken out; or if a charter has been granted by legislative enactment, though organization has not taken place thereunder; in either case the corporation is sufficiently formed to be treated as being *in esse*, and may be bound by the acts of a majority of the incorporators or promoters.

The idea originated in *Hall v. Vermont, Etc., R. R. Co.*,⁵ in which case the Court said: "It may be true that the company was not invested with full corporate powers until after the stock was subscribed, and their organization perfected in the

¹ *Weatherford R. R. Co. v. Oranger*, 24 S. W. 795 (Texas, 1894).

² *Paxton v. Bacon Mill Co.*, 2 Nev. 257 (1866).

³ *Chicago Coffin Co. v. Fritz*, 41 Mo. App. 389.

⁴ *Battelle v. Cement Co.*, 33 N. W. 327 (1887); *Little Rock, Etc., R. R. Co. v. Perry*, 37 Ark. 164 (1881).

⁵ 28 Vt. 401 (1856).

choice of directors ; yet the corporation was *in esse* before the event ; it had an inchoate existence and the corporators had the power and were so far the agents of the corporation as to bind them by any act which they were required to do, or which was necessary to perfect their organization under the charter."

While the result reached may be entirely justifiable, the grounds on which it proceeds involve considerable difficulty. It would seem that if the services were necessary to the company, and rendered with the expectation of compensation, the law would imply a promise to pay their reasonable value, and there would be no necessity for the Court to make use of the fictions of agency, and of corporate existence before organization.

The rule laid down in this case appeared as a dictum in *Low v. R. R. Co.*,¹ where it was said, (after a discussion of the above decision): "If it were true that, at the time the services were rendered, the corporation had no capacity to contract—which is by no means clear after the charter has been accepted—still, etc., etc.," and later: "The grantees named in the charter are the sole members of the corporation, until associates are admitted by them; and they may, at a meeting duly called and holden, accept the charter and choose directors and other corporate officers. They may, indeed, proceed to discharge the duties devolved upon the corporation by its charter without the admission of any associates. It is obvious, then, that to bind the corporation by an acceptance of the charter, or other act the concurrence of at least a majority of the grantees or members is necessary."

It will be seen later that in the Pennsylvania case of *Brill's Gap R. R. Co. v. Christy*,² the Court under a misapprehension of this rule, as laid down in *Low v. R. R.*, have confused it with the rule that "a man will not be allowed to unjustly enrich himself at the expense of another," and instead of using the two theories disjunctively, as is done in *Low v. R. R. Co.*, have made the consent of a majority of the corporators a pre-

¹ 45 N. H. 370 (1864).

² 79 Pa. 84. (1875).

requisite to a recovery in quasi-contract. The same anomalous doctrine is held in the later Pennsylvania case of *Tyft v. Bank*.¹

These latter cases, however, need not be further considered at this time, as they are not authorities for the proposition laid down in *Hall v. Vermont, Etc., R. R. Co.*; that proposition not having been understood as interpreted in *Low v. R. R. Co.*

Suffice it to say, that the rule under discussion has only been enunciated (as far as can be ascertained) in one other case,² and is now generally ignored. It has also been expressly denied,³ and would seem to be out of accord with the general rule, that the corporate franchises remain in abeyance till all the requirements of incorporation are fulfilled.⁴

As to what requirements are essential, and what may be overlooked without causing a fatal flaw in the corporate structure, is a question somewhat foreign to the present discussion; suffice it to say that it has been held (under a general incorporation law) that where the final certificate has been issued, but not properly recorded, the company is *in esse* and bound by its acts.⁵

CHAPTER III.

1. THE FORMER ENGLISH EQUITY RULE.

§ 1.

Much of the confusion in thought which is apparent in the decisions upon the subject of corporate liability for the acts of promoters is due, it is believed, to a view formerly entertained in England and originating in the courts of equity, that a company is the successor to its promoters, stepping into their place and assuming all their rights and liabilities. Or, as the thought appeared later in a modified form, if the association of projectors and the corporation are not one and the same body in different stages of existence, the promoters are, at least, agents of the

¹ 141 Pa. 330 (1891).

² *Harrison v. Vt. Manganese Co.*, 20 N. Y. Supp. 894.

³ *Gent v. Ins. Co.*, 107 Ill. 632 (1883); *R. R. Co. v. Ketchum*, 37 Conn. 170 (1858).

⁴ *Dartmouth College v. Woodward*, 4 Wheat. 791.

⁵ *R. R. Gazette v. Wherry*, 58 Mo. App. 423 (1893.)

company and can bind it for all purposes of organization. Now though, in these cases, the courts generally declared that the basis of their conclusion lay in the fact that the company had received a benefit and must assume the corresponding burden, they uniformly enforced the contract made by the promoters against the corporation, granting specific performance thereof (without regard to the actuality of the benefits accruing to the corporation), wherever it appeared that the party contracting with the promoter had fulfilled his part of the agreement. It would seem that, unless the Court conceived of the promoters as agents of the company with authority to bind it by contract, specific performance could not have been granted, however just it might be, to hold the company liable for the reasonable value of the plaintiff's land and services.

These cases will be considered at some length, because it is believed that the theory which they advance originated in a misapprehension of authority; and though this has been pointed out and the doctrine repudiated in England, the cases are not infrequently quoted in the American decisions. So far as they are to be taken to lay down the proposition that one cannot be allowed "to unjustly enrich himself at the expense of another," they are not to be questioned, but the results reached disprove the suggestion that this was the only principle invoked.

In the case of *Vauxhall Bridge Co. v. Earl of Spencer*,¹ Lord Eldon threw out the suggestion that the withdrawing of opposition to a bill in Parliament might, under certain circumstances, constitute a valid consideration for a contract.

A few years later, the case of *Edwards v. The Grand Junction R. R. Co.*² came up. Edwards, the complainant, filed a bill praying for an injunction to restrain the company from completing its road until it had complied with the terms of a certain contract entered into with the promoters. There had been a preliminary contract with the company, and application made for a similar contract with others, trustees of a turnpike company.

¹ Jacob, 64 (1821); 2 Madd. 356.

² 1 M. & C. 630 (1836).

Parliament. In consideration of the withdrawal of this opposition, the preliminary organization agreed that the company should construct and maintain a bridge of certain dimensions across the tracks for the pike to run over. To enforce this contract against the company the bill was filed.

Lord Cottenham, in delivering the judgment, said: "The objection to the bill rests upon grounds purely technical, and these applicable only to actions at law. The question is not whether there be any legal binding contract at law, but whether the Court will permit the company to use the powers under the act in direct opposition to the arrangement with the trustees before the act, and upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still it is clear that the company have acceded to and are now in possession of all the projectors had before. They are entitled to all their rights and subject to all their liabilities. If any one individual had projected such a scheme and, in prosecution of it, had entered into an arrangement, and then had assigned all his interest in it to another, there could be no legal obligation between those who dealt with the original and such purchaser; but in this Court it would be otherwise. So here, as the company stands in the place of the projectors, they cannot repudiate the arrangement into which such projectors have entered in their corporate capacity; they cannot use the powers given by Parliament to such projectors and refuse to comply with those terms, upon the faith of which all opposition to their obtaining such powers was withheld." The injunction was granted, his lordship resting his decision on the case of *Vauxhall Bridge Co. v. Lord Spencer*, which, as we have seen, merely suggested that withdrawing opposition might be good consideration for a contract, but did not even hint that the company would be bound if the contract were made before incorporation.

Here, then, we have the bold annunciation of the theory, unsupported by any adequate authority, that the "company stands in the place of the projectors" and "cannot repudiate the arrangement into which such projectors have entered in their corporate capacity." And his lordship's statement,

"If the company and the projectors cannot be identified," etc., is no qualification of this position, for he goes on to say, "still it is clear that the company have acceded to and are now in possession of all that the projectors had before. They are entitled to all their rights and subject to all their liabilities." This is in effect making the projectors and the company identical, for the conception of the Court seems to be that the company, upon coming into existence, was substituted for the promoters, and that all those contracts which were binding upon the promoters were necessarily obligatory upon the corporation.

In the two later cases of *Stanley v. The Chester & Birkenhead R. R. Co.*,¹ and *Petre v. Eastern Counties R. R. Co.*,² in which the facts were practically the same, Lord Cottenham arrived at similar results upon the same reasoning, both being bills in equity. See also³

The doctrine was again advanced in the leading case of *Preston v. Liverpool & Manchester R. R.*⁴ That was a bill praying specific performance of a contract entered into with the promoters of the company. Two associations were applying for charters to run roads over practically the same route. As only one charter would be granted, it was agreed between them that the successful applicant should assume all contracts made by the other with land-owners. The defendant company obtained the charter. The unsuccessful association had entered into an agreement with Preston for the purchase of his land. The defendant having changed its route somewhat, so that Preston's land was of no use to it, refused to buy or fulfil the contract. Preston filed this bill, to which the defendant demurred.

The Court said: "The doctrine in equity on this subject, where projectors of a company enter into contracts on behalf of a body not existing at the time of the contract but to be called into existence afterwards, is that if the body for whom

¹ 9 Simons, 264, a. c. 3 M. & C. 773 (1838).

² 1 Am. & Eng. R. Cas. 462.

³ St. Leonard's opinion in *Hawkes v. Eastern Counties R. Y. Co.*, 4 Eng. L. & Eq. 91 (1851), where other cases are cited.

⁴ 7 Eng. Law. & Eq. 124.

the projectors acted does not come into existence, it cannot take the benefit of the contract without performing that part of it which the projectors undertook that it should perform; that is, in substance, this Court treats the projectors for that purpose as agents of the company so afterwards called into existence." The demurrer was, therefore, overruled.

The case was appealed to the House of Lords on the construction of the contract, but was not reported till five years later.¹ In the meantime it was followed both here and in England, and is still very generally cited for the proposition that a corporation comes into existence *cum onere*, the fact having been overlooked, in a large number of instances, that the case was re-argued and a different result reached.

When the case came before the House of Lords on appeal,² Lord Chancellor Cranworth said: "The plaintiff's theory is, that the company comes into existence *cum onere*. I am aware that that is a doctrine acted upon by Lord Cottenham. . . . And it has been acted upon in so many cases that it would be very inexpedient offhand to say that that doctrine cannot be sustained, when one considers how much may have been done upon the faith of it. I must, however, own that when the subject comes to be very closely examined, I think there are objections of the gravest nature to its adoption, objections which do not seem sufficiently to have pressed upon the mind of his lordship. Lord Cottenham acted upon this principle that the railroad company was the successor of the projectors or the assignee, if one may say so, of the projectors, and must take existence subject to the burdens which had been contracted for by those who were the promoters of it and to whom it owed its existence. . . . Observe, my lords, to what this doctrine leads. There is that case of Lord Petrie, at which everybody starts when he hears it, in which there was a contract entered into by the projectors of a company that, if Lord P. would withdraw his opposition they would pay him £120,000 for that which was not worth above £4000. It may be that some of those who purchased the shares of that com-

¹ 5 H. of L. 605 (1856).

² 5 H. of L. 605 (1856).

pany were aware of that contract ; but in all probability that was not the case with the majority. If this might be done once, as in the case of Lord P., it might have been done with ten other landed proprietors, and there would have been a million of the capital of the subscribers contracted away from them without any sort of knowledge upon their part and for purposes quite foreign from those for which they subscribed.

If, therefore, this case had turned upon the validity or non-validity of that doctrine, I should have desired of your lordship's further time to consider as to the course which was to be taken ; but it does not."

The Court then proceeded to construe the contract and came to the conclusion that it was not a contract to pay £5000 for withdrawing opposition, but that plaintiff was to have received this sum if opposition were withdrawn and the land taken. That the taking of the land by the corporation was a condition precedent to its liability. That, as the land had not been taken, the contract fell, and it was not necessary to consider whether or not the corporation would have been bound if the contract had been interpreted differently.

Though the Court avoids expressly overruling the earlier cases, it is apparent from the fact that, by far, the greater part of the opinion is devoted to a stringent criticism of this doctrine promulgated by Lord Cottenham, that their dissent from it was intended to have the weight of authority. The case was argued at length and carefully considered, and the dictum expressed is so strong that it must be considered to have discredited the former rule.

The attitude of the Court upon the subject is even more clearly indicated in the opinion of Lord Brougham : " I have more than doubts of the soundness of those dicta, I may say of those judgments of my noble and learned friend, now no more ; I have more than doubts. I think they were carrying very far, indeed, a great deal too far, certain doctrines which had themselves been the subject of dispute."

The specific performance prayed for was therefore refused.

In the same year 1856 the doctrine was again strongly assailed in the House of Lords, in the case of *The Caledonian*

*& Dumbartonshire Junction R. R. v. The Magistrates of Helensburgh.*¹ The Magistrates contracted with the "Committee of Management" of the proposed company, undertaking to extend the harbor of Helensburgh and erect a quay; the company to pay part of the expenses. The magistrates having performed their part, bring a bill for specific performance, the defense resting on the ground that the company is not bound by the acts of its promoters.

The Court said: The argument of appellee "proceeds on the ground that the Committee of Management ought to be treated in the nature of agents for the company, which owes its existence to their exertions, and when the company came into being it was, from its very birth, bound to fulfil the contracts by which its projectors had stipulated that it should be bound. This reasoning rests on the assumption that a railway company, when established by Parliament is, in substance though not in form, a body succeeding to the rights and coming into the place of the projectors. . . . When such a body applies, however, for incorporation, what they ask for is not an act incorporating themselves only, but all who may be willing to subscribe the specified sums and so become shareholders, and those becoming shareholders have a right to consider that they are entitled to all the benefit held out to them by the act and liable to no obligation beyond those which are there indicated. . . . If secret and unexpected terms are to be held binding on those who take shares, the result may be ruinous to those who act on the faith of what appears on the face of the legislative incorporation. . . . I can discover no principle, legal or equitable, whereby such contracts can be held to be obligatory on the company.'" "In holding that the company is a body different from its projectors in substance as well as form, I am acting on what is the mere truth, and no injustice can arise to those who have dealt with the projectors, for against them and all under whose authority they acted, there will be a clear right of action if the company does not fulfil the engagements which they have contracted that it shall perform, and that is surely all which those who

¹ 2 Macq. H. of L. Cases, 393 (1856).

have dealt with the projectors can claim as their right. For these reasons I am of opinion that on principle there is no ground for holding that a company is bound by any engagement made by those who obtained its act of incorporation, unless those engagements are embodied in the act of incorporation itself." After a careful consideration of all the authorities, the Court goes on to say: "I have stated my reason for thinking that such a doctrine rests on no sound principle and may lead as, in Lord Petrie's case, I think it did lead, to great injustice. And if, therefore, the case now to be decided was in all respects similar to the three cases I have referred to, what I should have to decide would be whether I should advise your lordships to adhere to the precedents established by Lord Cottenham, on the ground that it is unsafe to act against a series of decisions even though they may appear not to rest on any solid foundation, or to depart from them and to adopt what I consider a just and more correct principle." His lordship thereupon differentiated this case from the others on the ground that the contract to pay for erecting a quay and enlarging the harbor, though ultimately for the good of the company, was not within its powers, and that since even a contract made by the directors could not be enforced against the company under such circumstances, certainly one made by promoters could not be.

This decision, like that of *Preston v. R. R. Co.*,¹ while avoiding the necessity of overruling the former cases, is unstinting in its condemnation of the theory therein contained, and since its time the doctrine, that a corporation can come into existence subject to burdens imposed upon it by its promoters, has never found credence in England. It has been suggested, indeed, that the case of *Spiller v. Paris Skating Rink Co.*,² rested upon this ground, but that case came up on demurrer to a bill which charged that the defendant company had acted upon and adopted the contract made for it by its promoters, and that, therefore, the plaintiff was entitled to have the agreement performed. And the Court held, that the demurrer having

¹ 5 H. of L. 605 (1856).

² 7 Ch. Div. 366 (1878).

admitted the fact of adoption, the plaintiff was entitled to the relief claimed, and the demurrer was thereupon overruled. The only thing decided, therefore, was that *after* the company came into existence it might voluntarily *adopt* the contract and become bound under it. Whether or not such doctrine be sound, it is an entirely different theory from the one under consideration, for it involves the conception that the obligation rests upon the intention of the company as expressed in its voluntary act, whereas, in Lord Cottenham's view the corporation enters upon its existence, *cum onere*.

§ 2. *Not applicable at law.*

It has been asserted¹ that this doctrine was, in England, of general applicability and in vogue both in courts of law and equity, and Mr. Redfield, in support of this proposition, cites the case of *Howden v. Simpson*.² That was an action of debt brought by Lord Howden against Sir John Simpson and others, formerly projectors of a railroad company, upon an instrument, under seal, in which the defendants had agreed to pay the plaintiff £5000 for withdrawing his opposition to a bill granting a charter to the railroad. The only question involved was whether or not such a contract was legal, in view of the fact that Lord Howden was a member of Parliament at the time. No attempt was made to hold the company, so that the case does not support the proposition advanced.

Pointing to a contrary conclusion is the case of *Payne v. Coal Co.*³ Promoters of the coal company, after provisional, but before complete registration, promised the plaintiffs that if they would give up their plan of organizing a similar company, they would see that plaintiffs should be made ship brokers for the defendant company when formed, and that said company would give plaintiffs a free passage to Australia. Assumpsit for breach of contract, in that the company refused so to do, though plaintiffs had performed their engagement in the matter.

¹ Redfield on Railroads, 5 Ed. p. 23.

² Keen, 523, 3 M. & Cr. 97, 10 Ad. & Ellis, 793, 9 Cl. & F. 61.

³ 10 Exch. 281 (1854).

Platt, B., said, "I am clearly of opinion, that it was beyond the power of the provisionally registered company to bind the completely registered company by entering into the contract." This decision denies the applicability of the so-called equity doctrine of *cum onere*, to cases at law, at a time when that doctrine was at its height in the courts of equity, and it seems probable from the statements made in *Melhado v. Porto Alegre Co.*,¹ and *Spiller v. Paris Skating Rink Co.*,² that the distinction in this respect between the two jurisdictions was always maintained.

The cases discussed in criticism of this doctrine, have dwelt largely upon the unfortunate practical results which would follow its adoption, the underlying thought being that if a company could be saddled with all the undertakings of its projectors, it would be brought into being, (through the incompetency or unscrupulousness of the promoters), in a condition unfit for the transaction of business, with the capital stock diminished or exhausted, and the stockholders (who could have had no notice of the transaction prior to incorporation) left without any adequate return for their money.

The doctrine seems also open to criticism on more theoretical grounds. It requires that the promoters be conceived of in one of two characters. Either as being in substance the corporation itself, as was suggested in the earlier cases on the subject, or as being agents of the company with power to bind it. It is clear that the conception in either case would be a pure fiction. That a corporation has no existence till it has received legislative sanction in some form or other, is well settled,³ and it is a mere truism when one says that any body of persons applying for such legislative sanction in the form of a charter can, under no circumstances, be the corporation which they are endeavoring to create. Unless they are conceived of as, in fact, the same body, the conclusion that the corporation stands in the same position as the promoters with all their rights and subject to all their liabilities would seem to

¹ L. R. 9 C. P. 503 (1874).

² 7 Ch. Div. 368 (1878).

³ Thompson on Corps., § 35.

be untenable. Again, it is well established that the corporation is distinct from the sum of its members,¹ so that what they might do in their individual capacities should not on theory bind the distinct and subsequently created company. This view is undoubtedly the one now generally adopted both in England and in this country.²

The theory of agency is equally untenable, for the correlative of "agent" is "principal" and there being no principal in existence the relationship cannot exist; and this is now uniformly acknowledged.³

Except as a fiction, therefore, this doctrine that a company can be bound before it is formed, and enters upon its corporate life "*cum onere*," must be considered unfounded in principle. As a fiction, the cases have shown that it works deplorable results. It is discredited in England, and has not been followed (as far as can be ascertained) since the decision in *Caledonian R. R. Co. v. Helensburgh*.⁴ The American authorities repudiate it.⁵

There seems, then, to be no longer any distinction, either here or in England, between the doctrines existing in the law and equity courts. But though the doctrine has been abandoned in its original form, the thought has not entirely passed away in America, that a relationship of agency exists between the promoter and the corporation.

Malcolm Lloyd, Jr.

¹ Thompson on Corp., §§ 1-3.

² *Battelle v. Cement Co.*, 33 N. W. 327 (Mo. 1887); *Munson v. R. R. Co.*, 103 N. Y. 58 (1886); *In re Northumberland Avenue Hotel Co.*, 33 Ch. Div. 16 (1886); *In re Empress Engineering Co.*, 16 Ch. Div. 125 (1886).

³ *Schreyer v. Turner Co.*, 43 P. 719 (Oregon, 1896); *Weatherford R. R. Co. v. Granger*, 24 S. W. 795 (Texas, 1894); *Long v. Bank*, 29 P. 874 (Utah, 1892); *Battelle v. Cement Co.*, 33 N. W. 327 (Mo. 1887); *Bullington v. Bardon*, 50 N. W. 776 (Wis. 1891); *Joy v. Manion*, 28 Mo. App. 55 (1887); *Davis v. Maysville Creamery Assn.*, 63 Mo. App. 477 (1895); *Huron Printing & Binding Co. v. Kittleson*, 37 N. W. 233 (S. D. 1884); *Pittsburgh Copper Co. v. Quintrell*, 20 S. W. 248 (Texas, 1892).

⁴ 2 Macq. H. of L. 393 (1856).

⁵ Cases cited, *supra*.

THE ADMINISTRATION OF JUSTICE IN JAPAN.

III. THE CODES AS A WORKABLE SYSTEM OF LAW.

If no Western nation had ever transformed its laws, if each people had developed its indigenous customs into a peculiar and unique body of law, if no importations from abroad had ever been employed to systematize or to replace the home product, the spectacle of the undertaking in which Japan has been engaged for twenty years might be thought a strange one. The hostile critic might have free play for his evil prognostications and might enjoyably spend his sarcasms on the doctrinaire process of transplanting and regrafting foreign customs. But, as it happens, there exist few nations of the West, outside the Anglo-American group, which are in a position to throw the first stone of the sort or have the inclination to begin such criticism. They are themselves too vulnerable, nay, they even see no wrong in such a process of transformation, and they uphold it. As England has never in eight hundred years felt the foot of an armed invader, so she has never in that period acknowledged a faith in any laws but her own. But it is a fact that in almost every other nation of Europe and America (except the United States) the accepted law of the land is not wholly an indigenous one, but has been borrowed from the Roman civil law by a people whose customs required more or less adaptation to it. This statement is not as yet true of Russia and the Scandinavian nations; but the fondness for German scientific speculation is growing daily in those countries and has made especial headway in the great northern peninsula; and if the advocates of German legal science have their way, as is not unlikely, we shall there see a much greater and more important work accomplished than that in which Japan is now engaged. Nor does our statement apply to Italy, the home of Roman law, though even here Austrian law has in part given way to French law; nor to some portions of what was formerly Turkey in Europe.

But if we look elsewhere, we shall see the Western world

almost covered by two great streams of legislation, which have taken their rise largely within the present century,—the one from a French source, the other from a German. The former rose earlier and has spread farther; the latter is even yet acquiring its full force. Many countries had the French Code imposed upon them by Napoleon, and some of these have never given up the system then received—Belgium, Baden, the Rhine provinces, Poland (in Russia), Geneva, and a few others. Poland has indeed suffered another change of laws and has come under Russian and Austrian codes. Austria herself, for nearly a century, has had a code, more or less kin to the civil law, which prevails in districts having such widely distinct individualities as Bohemia, Galicia, Dalmatia, and the Tyrol. Germany for nearly four hundred years has been slowly putting on the garb of the civil law, until its legal system now bears the same outward resemblance to the indigenous Germanic law that the Japanese Houses of Parliament do to the *yashiki* of Prince Shimadzu. The Goths of Spain long ago felt the yoke of the Roman law, and for centuries kept the Roman breviary of Alaric, under another name, until the Roman law had shaped their whole system. Servia in 1844 enacted a code modelled on the Austrian. Roumania, in remodelling her laws in 1864, made a code reproducing exactly the order of the French Code and agreeing with it in substance. Greece is founding new code-efforts on the French and Italian models. Scarcely a state in South America has not in its code manufacture felt in part the French influence—notably Brazil and Bolivia. In the Orient the dependencies and protectorates of France, Spain, and Great Britain are daily mixing the leaven of European law—as yet more or less separate and intact, because personal status almost always determines the law by which each person is governed, but before long to permeate the lands which its importers govern. There is, in fact, a world-movement of law, slow and imperceptible, like that of a glacier, but gradually covering and enfolding all the countries lying in its path. It is an illustration of the inevitable, the vigorous and coherent prevailing over the weak and formless. In some instances the indigenous law is entirely

displaced; in others it is absorbed; in still others it merely receives scientific form and statement.

We see, then, that the work of Japan is but a drop in the sea, a foot-path in the midst of highways, a single shot in the cannonade of centuries. This is not depreciating the importance of the work for Japan itself; for such a task seldom comes more than once in a nation's lifetime, and for each nation it has a right to be considered as epoch-making. But the remembrance that there is in progress a whole world-movement allows us to look with greater calmness on its manifestation in any particular quarter and to judge it more intelligently.

In every country the circumstances leading to the importation of laws have varied somewhat. In every country, too, the same problem, among others, has come up, with more or less urgency,—the adaptation of the new codes to the conditions of the country. And in every case, again, the same question has had to be met by the advocates of the new laws, viz.: How far are they in harmony with existing practices? This, of course, is by no means the whole of the problem. The new rule may directly contradict the old one, and yet be decidedly preferable. Or the new rule may fill a gap which the growing complexities of commerce have left open in the old. Or there may be a conflict of custom, which will justify the legislator in stepping in and settling it as he thinks best. Certainly, where the forms of commerce have changed, or where moral standards have progressed, the law should advance also; and this element of the problem is one of the most important as well as one of the most difficult. But for a greater or less part of the legal system this question will still be the decisive one: Do the new laws substantially conflict with the existing rules as understood and upheld by the people? After eliminating all these considerations of reform, there will be large portions of the law where the mere fact of a conflict must be regarded as an argument against the code. Not that this need determine the fate of such laws or parts of the code, for other motives may be of higher consequence than a discrepancy of law and custom. But, at least so far as

such a consideration goes in the scale, it will then weigh against the new laws.

The material for the examination of this question has recently come to hand, in the shape of four volumes, published by the Asiatic Society of Japan, under the editorship of the writer of this paper. These form Parts I., II., III., and V. of a series (ultimately to contain eight volumes), entitled "Materials for the Study of Private Law in Old Japan." They are partly the records of customary law obtained in 1877-8 by the Government through a commission appointed in connection with the preparation of the codes; partly a collection of the decisions of the courts of the old régime, and partly a summary of commercial institutions and customs, made by the editor from the investigations of Japanese scholars. Of the many topics that suggest themselves for comparison between the new codes and the old legal notions, only two or three can here be taken up. The first shall be Ownership; the second, Sale; the third, Real Suretyship; and the last, Commercial Paper.

Of the preliminary provisions of Book II., "Property," it is needless to say that there are no comparisons to make. If Japanese scholars had been less gentlemen and more men of the people, if they had not stunted their minds with the dry nourishment of the Chinese annalists, and had not acquired a scholarly snobbery which unfitted them for true science, they would doubtless have created a legal literature, as Europe did. They would have formulated general legal conceptions and differentiated rights and obligations. But, as it is, there is not a law text-book to be found (if we except the tedious commentaries on the antiquated codes of the last millennium,—commentaries which rival the Glossaries of the European Middle ages in long-drawn-out pedantry); and a legal definition is something that is turned up only by the greatest chance, like a sovereign under a wayside stone. There was never any scientific, scarcely even any literary, treatment of the law; and hence we have nothing to compare to the preliminary propositions of the new code. But one thing at least is worth noticing. Art. 30 of Book II. declares the right of

property to be a natural right to use, enjoy, and dispose of a thing within the limits of the law. Now this right of property may never have been given a definition in Old Japan, but at least it *existed*. This is worth while insisting upon, for it is an idea not uncommon among foreigners that Old Japan was a feudalism in which no rights of the common people were recognized and respected. This is not true,—no truer than it was of England under the Tudors. Many an English farmer in those days saw his corn ruthlessly ruined by the noble hunters who followed the fox; and, seeing, bore it in impotent anger. Many a poor wretch writhed under the arbitrary dealing, miscalled justice, of judges like Jeffreys. Many a rich Jew saw his money disappear forever into the hands of the prince who wanted what he pleasantly chose to call a loan. Many a man spent years in Newgate dens at the false suit of some oppressive aristocrat whom he had offended. But the farmer was none the less an owner of property; English justice was no less a national fact; and the action of debt was no less a foundation stone of civil procedure. Whatever may have been in Japan the chicanery of this or that *daikwan*, or the insolence of a drunken *samurai*, law reigned and right existed under the Tokugawa Shoguns. The merchant could and did sue the *samurai* when he pleased,—a privilege which did not exist in Sweden, for instance, until the reforms of Struensee in the last century. The feudal lord could not and did not take away the farmer's land as he pleased. It is Rémusat, if we are not mistaken, who says that custom is in Oriental countries a greater tyrant than the so-called despot himself. People forget that in feudal Japan, as in mediæval England, the constitution was set deep in a strong foundation of custom; and the force of tradition and opinion was the sufficient sanction of property rights. Take for proof the statements of the Collection of Customs on this power of the lord to deprive the farmer of his land. There was no fief in which the administration was more strict or the tax burdens more heavy than that of Sendai (Rikuzen *kuni*). Yet there we find it recorded: "The owner of realty can do as he pleases with it, except that he may not sell it in per-

petuity. *His ownership is inviolable*, unless it is confiscated for crime or taken for public purposes," both being recognized processes of English law. Furthermore, "the latter occurs when the feudal officer needs the land for a special purpose or when a reservoir or storage for public use has to be constructed on the land. An order is issued for the taking, and other land is given by way of recompense; but if there is no other land that can be so given, the owner of the plot taken must suffer the loss, and cannot even claim the price." This right of compensation was thus an incomplete one in this fief. But it may be worth remembering that even to-day the constitutions of at least three of the United States permit the taking of land for public purposes without compensation, and that this has been done by the Legislature of at least one State. In Uzen *kuni*, again, "the person so entered [in the register] as owner has a perfect title, and may sell, pledge, or otherwise dispose of the property. His ownership is inviolable, except in case of confiscation for crime by order of the feudal lord. . . . When saltpetre is discovered in a lot of residence-land, the feudal lord has the exclusive right of mining it; but compensation will be paid to the owner for any injury inflicted thereby." In Idzumo *kuni*, it is related, "[land] may be sold, mortgaged, or otherwise disposed of at pleasure, provided taxes are not in arrear. No one can under any circumstances be deprived of his property against his will." These statements are no less than could be made in any European country. If these extracts were not enough to indicate the general conception of land proprietorship, the almost universal prevalence of the land-registry system would point unmistakably to the regularity and security of proprietary rights, and the constant employment of the terms *jū-nushi* (land-owner) and *ie-nushi* (house-owner) would indicate the nature of the popular conception.

We think complacently in some of our Western countries (unfortunately England is here able to show anything but complacency) of the advance that has been made in the present century in the registration of proprietary and hypothecary titles to realty, especially in Continental Europe. Perhaps it

would not be safe to say that Japan has preceded all Europe in the establishment of a registry system; for we do not yet know whether before the time of Iyeyasu (1600) the Japanese registry system was well organized. But certainly there is no civilized state in which the system has been more thoroughly in force in all dealings with land for a longer time than in Japan. In England the Saxon shire-register disappeared under the Norman régime, and the Domesday Book was a passing effort at publicity which was not persisted in. Germany, since the early middle ages, had no registry system (except in a few commercial towns like Hamburg, Lubeck, and Bremen) until the Prussian hypothecary-registration law of 1783, and the general registration of land-titles is a matter of the present century. In France, transfers of ownership were not registered (since the feudal system of the Middle Ages) till the Revolution; the spirit of the Roman law having everywhere been unfavorable to this expedient. There is no nation among whose people the idea of land-registration has become so deeply instilled as one of the elements of rights in land as in Japan. The absence of a registry is simply unthinkable to the ordinary Japanese, and his mind turns to the registry as the proper accompaniment of all land-transfers, as naturally as the passenger taking the railway turns first to the ticket-office. The Japanese student smiles when he hears that England has no registry system, and it is practically impossible to get him to consider seriously the many complications arising under Anglo-American law for lack of it. For him it is a matter of pure speculation, a reasoning about the unreal.

We come now to Sales. A sale, says Art. 25 of the Code, is complete upon an agreement being reached by the parties. For immovables (realty), however, a registration is necessary at the land registry office. This, as has already been stated, is quite in harmony with an almost universal custom of Old Japan. Registration in some form or another seems to have been usual in all transfers of realty; and even in case of horses and other personalty the feudal lords frequently required the recording of transfers. When one considers what a large

place the transaction of sale occupies among those dealing with land, one realizes how important the fact of this harmony of code and custom is in this particular relation. Imagine the state into which all England would be thrown to-day if a law of compulsory registration of land sales were imposed, and we can understand what it means to assert that the new Code is opposed to the customs of the people, and what it means to show that, on the contrary, the new Code, in so broad and radical a feature as this, finds itself in entire accord with the immemorial habits of the nation. It may be noted here that while the fees for registration are in America customarily paid (we believe) by the seller, the Japanese (and the French) custom has been (according to the Collection of Customs) for the buyer to undertake these. The Code (Art. 34) leaves it to the agreement of the parties; but in the absence of agreement divides the expense equally between them. In America the registration fee is fixed according to the number of documents; in Old Japan it was a percentage (*buichikin*) of the price paid, with various presents and feasts to the officials in addition. Under the Code the fee is regulated by the assessed value of the plot transferred. In the West the last method is impossible; but in this country it is quite feasible, more just, and far more effective than the practice in Old Japan, which was always liable (as the Collection of Customs mentions) to evasion by the parties.

In the articles dealing with earnest-money we find a coincidence of custom between Rome and Japan which is not merely interesting but even startling. Long ago, even before Justinian's codification, the rule of Roman law was that, where earnest-money (*arra*) was given, the buyer, on withdrawing, forfeited the sum; the seller, on refusing to deliver, must restore double the earnest. This provision came down the ages and found a place in the Code of Napoleon. It gives one almost an uncanny feeling, in looking over these records of Japanese customs, taken down from the lips of men who had never heard of Rome or the French Code and had even (in most instances) never seen a foreigner, to find a dozen passages indicating that the identical rule of Roman law

obtained in Old Japan. In Suruga *kuni*, for instance: "If the buyer repudiates a contract of sale, he loses the earnest-money; this they call 'losing the earnest.' If the seller repudiates, he must pay back double the amount of the earnest; this they call 'returning double the earnest.'" The name is sometimes "clinch-money" (*sashi-kin*), sometimes "contract-money" (*yakujo-kin*); but the rule is always the same. Doubtless we may persuade ourselves that it was natural enough to hit upon the same expedient even in communities so widely sundered. But this is not the first instance we have cited of a peculiar coincidence in ideas between Japanese and French traditional rules; and we cannot refrain from calling attention again to the greater facilities which French law has offered in the task of giving scientific form to the legal principles established among the Japanese people.

The incidence of the risk of an article sold is, perhaps, one of the most important questions in the transaction of sale, and of course depends usually upon where the title to the article is at the time of loss. For a century the law of England and America has been that the title passes immediately on striking the bargain, unless special conditions are imposed. The old Roman law was that the title could not pass until delivery, a notion, perhaps, usual in a less advanced state of law, though the risk passed immediately to the buyer. The French law has gradually got away from this requirement towards the Anglo-American position (though in the new German Draft Code the policy of requiring delivery has prevailed); and by the Japanese Code (Book II., Art. 331, Book III., Art. 25) the title ordinarily passes at the time of the bargain and without delivery. Hence follows the rule of the Code (Book II., Art. 335) that the article (when specified) is from the time of the bargain at the risk of the buyer, where no condition has been imposed and where the seller has not specially undertaken the risk. The question is—How does this accord with existing Japanese notions? Here, as might be expected, we find a variation of custom. There are eight passages referring to the point in the records of customs. In four the risk is placed on the seller; in three on the buyer; and in one other

it is determined in a peculiar manner, viz., according to the point reached on the journey by the vessel bearing the goods. Where the seller bears the risk, much must be allowed for the possibility that the parties conceived the sale as conditional, and therefore not yet consummated (as would often be the case where earnest-money is given), and thus even under the Code the risk would be on the seller. What the general belief is among Japanese vendors and purchasers as to the incidence of the risk can thus not be clearly ascertained from these records of customs. In either case the prevailing custom in some sections will have to be sacrificed, and the legislators in making their choice of principles have put themselves in line with the general trend of modern French and English practice. We fancy that Japan will in this respect, at least, be no worse off than Germany would be under her new Draft Code, after rejecting the prevailing rule of buyer's risk and throwing the risk on the seller.

The chief obligations of the seller, according to the Code, are (1) to deliver, (2) to guarantee title, and (3) to warrant the absence of defects; and of the buyer, to pay at the time and place agreed. In the Collection of Customs we read that "in sales of personalty the seller must deliver the article, and must also guarantee its genuineness; the buyer must pay at the time and place agreed on." As to the first obligation, the general custom in Japan was, as we might expect, to place it on the seller, as in the Code. This is the sense of the half dozen passages touching on the point; though of course the parties might have agreed to the contrary. The second obligation, the guarantee of title, is not spoken of in the Collection of Customs. But we know that a covenant against eviction was long ago used in Japanese deeds of land, and there will be nothing new in the principle here given legal sanction. The Collection of Customs, however, mentions several times what corresponds to the English covenant against disturbance by the grantor or those claiming under him; it reads, "neither I nor my descendants may hereafter raise objection to this transfer." But this guarantee seems not to be required by the Code.

There is a third implied obligation on the seller, dealt with in the Code (Art. 94) among the causes for rescinding the sale. This is the warranty of freedom from radical defects. The sale is avoidable for non-apparent defects, irreparable and unknown to the buyer, if they affect substantially the usefulness or value of the article to the buyer. This general idea appears clearly in the Collection of Customs, though not so accurately defined as in the Code. In Settsu *kuni*, "payment may be refused where the realty or personalty is of a different nature from that contracted for, or where the quantity is different." (Deficiency of quantity is governed by Arts. 48-53 of the Code.) In Idzumo *kuni*, "when an article turns out to be not as contracted for, the buyer may refuse to take it, without forfeiting his earnest-money." "Not as contracted for" is the rendering of "*gan* (spurious)—*so* (make)." Again, as indicated in the Code, "where the article is bought, and delivery taken, and cash paid down at the time, the buyer cannot complain that the article is not as contracted for, because it is due to his own short-sightedness." This is the traditional English doctrine of *caveat emptor*. Others of the less usual forms of sale found sanctioned and regulated in the Code are also testified to in the Collection of Customs. Take, for example, sale by auction. This is the proceeding prescribed in Art. 104, in case the owners of an indivisible thing cannot agree upon a division or sale. Now, in the first place, the auction was one of the commonest institutions of Old Japan. Under the form of a "secret-ticket sale" (that is with written bids) it was used in all parts and among all classes. Furthermore, it was used, among other purposes, in the very instance prescribed by the Code, as we learn in two or three passages. In Kaga *kuni*, "where a house or an article made with money contributed by a number of persons is to be sold, ordinary auction or secret-ticket sale is employed." In Shinano *kuni*, "where there is to be a sale of something which belongs to several persons in common, secret-ticket auction is employed." In Sagami *kuni*, "When . . . forest timber, which is the common property of a village, is to be sold, the sale is held by auction." Here, then, it is perfectly clear that the people will find their traditional pro-

cedure fall in exactly with that prescribed by the Code. Moreover, the auction sale is stated to have been employed for disposing of the effects of a bankrupt or of one whose property had been confiscated for crime; and from this it is but a slight transition to the auction sale on an execution by a bailiff, as employed in modern law. The whole idea of using sale by auction wherever conflicting interests are concerned and securities are needed for impartiality and fairness, was evidently familiar in Old Japan.

Another point which must be noticed is the elaborate provisions in the Code (Arts. 84-93) concerning the right of re-purchase reserved by the seller. These correspond to a practice little known in Anglo-American communities, but very common in a state of society like that prevailing in Japan and surviving even yet in Europe; it finds a recognition in the French Code, and even in the new Draft German Code under the heading *Wiederkaufsrecht* or option of re-purchase. The Code has given full recognition to this custom. A limit has been placed, however, upon the time for which this privilege can continue. In old custom this period was often indefinite or even perpetual; sometimes it was as short as two years. The Code fixes it at five years for realty, and two years for personalty. The conflict of custom requires that some uniform rule should be adopted.

The pledge of realty is something quite uncommon in modern Europe and America, and the chapter on this subject in the Code is unique in works of the kind. In Roman law its commonest form was known as *antichresis*, in which the creditor took possession of the land and appropriated the profits in reduction of interest. In Japan the entire profits were taken in lieu of interest. The usual transaction was for the creditor to lease the land back to the debtor as tenant (*jūhikasaku*). For these pledges the Code declares (Art. 119) that there shall be a writing, and that unless registered the transaction shall not be valid as against third parties. The requirement of a writing was universal in Old Japan, and that of registration was also, so far as appears, without exception.

The document constituting the pledge, says Art. 120, "must

contain, in addition to a precise description of the realty, the amount of the claim and the interest." Certainly the people of this country will not be put out of countenance by the new-fangled notions, for this, for instance, is what a deed of pledge customarily contained in Shinano *kuni*: "A recital that the description of the plot by area, grade of soil, and name, agrees with that contained in the land register; a recital that a specified sum of money has been borrowed for a specified term of years; a stipulation that the property may be redeemed on the expiration of the term by paying the amount of the debt; and a stipulation that all taxes and charges shall be paid by the creditor during the term. If the description of the piece of land takes up more than one page, it is put on a separate paper, which is also attested by the village officers and is duly referred to in the principal instrument." And what terrors can the Code have for a community accustomed to the following process, which obtained in Echigo *kuni* for the registration of hypothecs: "The instrument is countersealed by the debtor's company and transmitted with a petition to the ward representative; the latter searches the register to see whether a prior mortgage exists, enters in the register of the ward assembly the debtor's name, the amount borrowed, the term, and the interest, certifies by inscription the genuineness of the instrument, and hands it to the elder, who examines, endorses, and seals it?"

The Code prescribes unconditionally (Art. 125) that the creditor "shall pay the taxes and other annual imposts." The Tokugawa rule was equally plain and insistent, and was directed against all the various forms of evasion of this just principle. "Any provision that, while the pledgee shall cultivate the land and take the profits, the pledgor shall nevertheless pay the taxes and render the local services; or that the pledgor who attorns as tenant of the pledgee shall render the local services; or that the pledgor shall attorn as tenant of the pledged land and shall pay and render taxes and services . . . is unlawful." The Code perpetuates (Art. 126) the old rule that the creditor is (in the absence of special contract) to take the profits of the property, if it is cultivated or forest land, in

lieu of interest, thus taking the risk of good or bad crops. In hypothecs, on the contrary (where the debtor keeps possession), the creditor of course gets only the interest on his loan. The Tokugawa Courts enforced this rule strictly, and where, for some reasons, a pledge of realty proved invalid, they treated it as a hypothec and reduced the rental due from the tenant-debtor to the rate of legal interest.

(To be continued.)

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

The House of Lords has reaffirmed the well-established rule, that when a debtor pays money to his creditor without appropriating it to particular items of indebtedness, the right of appropriation devolves upon the creditor, and he may exercise that right up to the very last moment, by action or otherwise, the application of the money being governed, not by any rigid rule of law, but by the intention of the creditor, expressed, implied, or presumed; and that the rule in *Clayton's Case*, 1 Meriv. 585, 1816, that in case of a running account the items are to be set off against each other in their order, does not apply to a case where there is no running account, or where from an account rendered, or other circumstances, it appears that the creditor intended not to make any appropriation, but to reserve the right to do so: *Cory Brothers & Co. v. Owners of Turkish Steamship "Mecca,"* [1897] A. C. 286.

The Court of Appeals of Kentucky has recently held, in accord with its prior decisions, that § 864 of the Kentucky Statutes, which recognizes the right of a building association to require borrowing members to pay dues or premiums in addition to interest at the rate of six per cent., the rate fixed by law as to all other borrowers of money, violates § 59 of the constitution, forbidding the general assembly to pass local or special laws "to regulate the rate of interest," since the transaction is in effect a borrowing and lending of money, and the dues or premiums exacted are in the nature of interest; and that it also violates § 3 of the bill of rights, which provides that "no grant of exclusive separate public emoluments or privileges shall be made to any man or set of men, except in consideration of past services:" *Simpson v. Kentucky Citizens' Bdg. & Loan Assn.*, 41 S. W. Rep. 570. It has also held that such a loan by a foreign building association, secured by mortgage on land in Kentucky, is a Kentucky loan, and governed by its usury laws: *Pryst v. Peoples' Bdg., Loan & Sav. Assn.*, 41 S. W. Rep. 574.

Building
Associations,
Usurious
Interest,
Constitutional
Law

Collateral Inheritance Tax. Constitutionality. Exemptions. The Supreme Court of California has declared that the collateral inheritance tax law of that state (Stat. 1893, p. 193), is not unconstitutional, though it does not tax inheritances by brothers and sisters of the deceased, while taxing inheritances by the children of such brothers and sisters, and though it exempts inheritances not exceeding \$500: *In re Wilmerding's Estate*, 49 Pac. Rep. 181.

Conspiracy. Trust. Right of Action. The fact that an association has been formed for the purpose of controlling or fixing the price of merchandise or property, in violation of statute, gives no right of action against the association to one to whom it refuses to sell such merchandise or property: *Bruster v. Miller*, (Court of Appeals of Kentucky,) 41 S. W. Rep. 301.

Constitutional Law. Costs in Criminal Cases. The Supreme Court of Tennessee has recently held constitutional an act of the legislature providing that the state or county should only be liable for costs in certain classes of criminal cases, although it was attacked on the grounds (1) that it worked a great hardship on officers and witnesses; (2) that it required their services without compensation; (3) that it was not general; (4) that it deprived the accused of a fair and impartial trial, by putting a premium on conviction; and (5) that it amended previous laws relating to fees and costs without naming them: *State v. Henley*, 41 S. W. Rep. 352.

The important parts of the statute in question are as follows: "Neither the state of Tennessee, nor any county thereof, shall pay or be liable in any criminal prosecution for any costs or fees hereafter accruing, except in the following classes of cases:

"(1) Cases of homicide, rape, robbery, burglary, arson, embezzlement, incest or bigamy, when the prosecution has proceeded to a verdict in the circuit or criminal court;

"(2) Cases under the small offense law where the defendant has submitted before a justice of the peace and been sent to the workhouse, and

"(3) All cases where the defendant has been convicted in a court of record and the execution issued upon the judgment against the defendant has been returned *nulla bona*: provided

"That neither the state of Tennessee, nor any county

thereof, shall be liable for, or pay any costs in any criminal case where security has been accepted by the officer taking the security, and an execution afterwards returned *nulla bona* as to the defendant and his securities.

"Sec. 2. Be it further enacted, that neither the state of Tennessee, nor any county thereof, shall pay or be liable in any criminal case or prosecution for the fees, costs, or mileage which may hereafter accrue in favor of any witness who shall, at the time of his attendance as such witness, before any court, grand jury, or magistrate, reside within five miles of the place where he attends as such witness."

Creditors of a corporation that has made an assignment for the benefit of creditors release their rights under the assignment when they consent to a plan of reorganization, and accept bonds of the reorganized company in payment of their claims: *First Natl. Bk. of Chattanooga, Tenn., v. Radford Trust Co.*, (Circuit Court of Appeals, Sixth Circuit,) 80 Fed. Rep. 569.

A provision in a general corporation law that directors must file an annual report of the condition of the corporation, and that on failure to do so they shall be liable for the debts of the company contracted within a specified time is germane to the subject of the act as expressed in the title "an act to provide for the formation of corporations," and the act is not unconstitutional on that ground: *Ludington v. Heilman*, (Court of Appeals of Colorado,) 49 Pac. Rep. 377.

Wheeler, Dist. J., of the Circuit Court for the Southern District of New York, has ruled that the liability imposed by the statutes of Maryland, (Code Pub. Gen. Laws, Art. 23, §§ 67, 69,) on the directors and officers of a corporation who declare dividends rendering the corporation insolvent or impairing its capital, or who make loans to stockholders, is not a liability for wrongs to property rights and interests, such as that the cause of action therefor survives against the representatives of a deceased director or officer, under the statutes of New York, (2 Rev. Stat. N. Y. p. 447, § 1): *Boston & M. R. R. Co. v. Graves*, 80 Fed. Rep. 588.

**Sole Owner
of Stock,
Rights of
Transferee of
Property**

In a recent case in the Court of Civil Appeals of Texas, one M., who was the president and general manager and owned all the stock of a corporation, except a few shares which belonged to his ward, conveyed, in his individual capacity, to his son, certain real estate of the corporation by a general warranty deed, purporting to grant a fee simple, in consideration of a sum due the son from the estate of his mother, the grantor's wife. For several years prior to the conveyance, the corporation had ceased to do business, or keep up its organization. Under these circumstances, it was held that the grantee was the "sole, absolute and unconditional owner" of the property in fee, within the meaning of a policy of fire insurance upon the premises: *Phoenix Assur. Co. of London v. Deavenport*, 41 S. W. Rep. 399.

This is consistent with the decision in *McElroy v. Minnesota Percheron Horse Co.*, 71 N. W. Rep. 652, 1897, 36 Am. L. REG. N. S. 511. Such cases are not an exception to the general rule, that the ownership of all of the stock of a corporation does not dissolve the corporation, or vest the title to its property in the sole owner, but rest on a different principle.

**County,
Liability for
Acts of
Officers**

When a sheriff, having a warrant for the arrest of a man charged with larceny, takes a citizen's horse, and pursues and overtakes the felon, but in doing so overdrives and injures the horse, the county is not liable for its value: *Randles v. Waukesha Co.*, (Supreme Court of Wisconsin,) 71 N. W. Rep. 1034.

**Death,
Presumption,
Will,
Construction**

The Supreme Court of Rhode Island has reasserted the settled rule, that when two or more persons perish in the same disaster, and there is no way of determining which died first, the presumption, as far as the right of succession to their estates is concerned, is that all died at the same moment; and holds (1) that when three testatrices (sisters) die in this manner, a bequest or devise from one to another does not take effect; and (2) That as in the case in hand each left a will devising all her estate to her two sisters, directing that after the decease of the last surviving sister, \$500 each should be paid to two nieces, and \$200 to one S., out of the proceeds remaining after payment of debts, the surviving niece, (one having died during the lifetime of the sisters,) was entitled to \$500 and

S. to \$200 out of the personal estate of each of the three sisters, while their heirs were 'entitled to the residue of that and to the real estate, as if no will had been made: *In re Wilbor*, 37 Atl. Rep. 634.

Under the laws of Washington, which provide that "any ballot or parts of a ballot from which it is impossible to determine the elector's choice, shall be void and shall not be counted; provided, that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, it shall be the duty of the judges of election to count such part," (Laws 1895, p. 393, § 10.) that "no ballot shall bear any impression, device, color or thing designated to distinguish such ballot from other legal ballots, or whereby the same may be known or designated . . .," (Laws 1895, p. 393, § 11.) and that no ticket shall be lost for want of form, or mistake in initials of names, if the board of judges can determine to their satisfaction the person voted for and the office intended, (Gen. Stat. Wash. § 413,) no ballot is vitiated by marks, other than those required by statute, made by a voter in an honest effort to express his choice, or by a variance from the prescribed method of marking the ballot, where the intention is not apparent; and consequently ballots on which the cross is placed at the left of the candidate's name, instead of at the right, in which two crosses, instead of one, are placed opposite the name, in which a cross is placed opposite one name, and the name of the opposing candidate is erased, in which a cross is placed after the name of each of two opposing candidates, and one of those marks is erased or scratched over, and in which the words "yes," "no," "for" or "against" are written opposite questions to be voted on, are valid. But, on the other hand, ballots are vitiated by any marks which obviously were not made with any intention to express the choice of the elector; and hence ballots with the words "Rats," "don't want any king," and the names of persons not candidates written on them, are void: *State v. Fawcett*, (Supreme Court of Washington,) 49 Pac. Rep. 346.

The Supreme Court of Tennessee has very justly decided, that if a blind man, believing in good faith that he is submitting his case to the proper officer, allows an unauthorized person to mark his ballot, the ballot is not void under a statute (Acts Tenn. 1890, c. 24, § 16.) which provides that only the officer holding the election can lawfully mark ballots for persons disabled from marking them themselves: *Moore v. Sharp*, 41 S. W. Rep. 587.

The Supreme Court of Texas recently ruled that the taking of land for public use is not in the nature of a conveyance, but is the exercise of the superior title of the government; and consequently the appropriation of the lands of a married woman is completed when the proper authority decides to take the land and pays for it, no matter in what mode payment is effected, compliance with the statutory requirements as to conveyance by married women being unnecessary. As a corollary of this, it follows that a married woman may, with the consent of her husband, waive the invalidity of a condemnation of her separate property for public use, by accepting the compensation awarded, without executing a waiver in the statutory form: *City of San Antonio v. Grandjean*, 41 S. W. Rep. 477.

A returned letter is inadmissible to prove that the person to whom it was addressed did not live in the place to which it was directed: *Dawson v. State*, (Court of Criminal Appeals of Texas,) 41 S. W. Rep. 599.

An officer of a corporation, who, by false and fraudulent statements, induces certain persons to purchase worthless stock in the corporation, is guilty of obtaining money under false pretenses, though the title to the money obtained passed to the corporation; and it is no defense that after the corporation obtained the money he received none of it: *Commonwealth v. Langley*, (Supreme Judicial Court of Massachusetts,) 47 N. E. Rep. 511.

In a recent case before the Court of Appeal of England, *Trustee of the Property of New, Prince & Garrard v. Hunting*, [1897] 2 Q. B. 19, affirming [1897] 1 Q. B. 607, a bankrupt, two days before his bankruptcy, executed a deed, by which he conveyed an estate to a third person upon trust to raise thereout by sale or mortgage £4200, and to make good therewith divers breaches of trust which he had committed in respect of certain scheduled estates of which he was trustee. This was held not to be a fraudulent preference, because the object of the bankrupt in executing it was not to prefer some creditors to others, but to shield himself from the consequences of the breaches of trust committed by him.

Gambling Transactions, Principal and Agent, Liability as Agent

When a broker receives money from his principal to be used for gambling in futures, and actually deals with third parties, from whom he realizes profits in the course of these illegal transactions, he is responsible, as agent, to his principal, as for money had and received for the principal, for the amount of the profits thus realized: *Lovejoy v. Kaufman*, (Court of Civil Appeals of Texas,) 41 S. W. Rep. 507.

Garnishment, Property of Criminal

The Supreme Court of Tennessee has adopted the prevailing doctrine, that when an officer of the law, acting either under police rules or on his own responsibility, takes from a prisoner personal property in no way connected with the criminal charge, either for its safe keeping, or to remove from his control that which might be used in effecting his escape, such property is not liable to garnishment in the officer's hands, or in those of any one with whom he deposits them: *Hill v. Hatch*, 41 S. W. Rep. 349.

General Average, Bond, Statement

A shipowner may make out his own average statement, and is not bound to employ an average stater (*American*), adjuster,) either at the port of discharge or elsewhere; and when, by an average bond executed at the port of discharge, the consignees of cargo undertake to furnish to the shipowners a correct account and particulars of the value of the goods delivered, in order that the amount of average contribution to which they are liable may be ascertained and adjusted "in the usual manner," these words do not imply as a condition of the obligation that the shipowners shall employ an average stater at the port of discharge: *Wavertree Sailing Ship Co. v. Love*, (Judicial Committee of the Privy Council,) [1897] A. C. 373.

Infant, Apprenticeship

An infant can make a binding contract of apprenticeship to learn a useful trade, and cannot avoid that contract on becoming of age; and if he violates it, he will be bound by a clause therein providing for the retention and forfeiture of part of the wages due him: *Pacey v. American Ship-Windlass Co.*, (Supreme Court of Rhode Island,) 37 Atl. Rep. 706.

The courts of New York will not enjoin the prosecution of an action between citizens of New York in another state, merely because the rule in that state as to evidence of transactions with decedents is more liberal than in New York, and the action involves such a transaction; the difference is merely one of evidence, not of substantive right: *Edgell v. Clarke*, (Supreme Court of New York, Appellate Division, First Department,) 45 N. Y. Suppl. 979.

The Supreme Court of New Jersey has recently decided, that a contract to indemnify a common carrier of passengers against losses occurring from injuries to passengers carried by it is not invalid as against public policy, on the ground that it covers losses resulting from their negligence or the negligence of its servants: *Trenton Pass. R. R. Co. v. Guarantors' Liability Indemnity Co.*, 37 Atl. Rep. 609.

Under a policy providing for payment to the insured of all sums which he "may become liable for in damages" for personal injuries, and that the insurer shall have charge of all litigation against the insured for such damages, the liability of the insurer accrues when that of the insured for certain damages has been finally determined, though he has not paid the same; but the liability of the insured for damages is not determined by a judgment against him, so as to render the insurer liable, while an appeal from the judgment is pending: *Fidelity & Casualty Co. v. Fordyce*, (Supreme Court of Arkansas,) 41 S. W. Rep. 420.

The Supreme Court of New York, Appellate Division, First Department, has lately held, reversing 41 N. Y. Suppl. 839, (36 AM. L. REG. N. S. 146,) that when one of the intermediate premiums on a life policy payable to the wife of the assured was paid with her money, the fact that the other premiums were paid with stolen funds does not give the person from whom the funds were stolen a right to the entire proceeds of the policy, subject to a lien in favor of the beneficiary, for the sum contributed by her, but entitles the latter to her *pro rata* share of the proceeds: *Dayton v. H. B. Claffin Co.*, 45 N. Y. Suppl. 1005.

The Court of Appeal of England has affirmed the decision of Collins, J., in *Universe Ins. Co. of Milan v. Merchants'*

Marine Insurance, Payment of Premium *Marine Ins. Co.*, [1897] 1 Q. B. 205, (36 Am. L. REG. N. S. 264.) that the rule of law, founded on mercantile custom, by which the broker, and not the assured, is liable to the underwriter for the premium on a policy of marine insurance, is not limited to the ordinary form of Lloyd's policy, but extends also to a "company's policy," which contains a promise by the assured to pay the premium: *Universo Ins. Co. of Milan v. Merchants' Marine Ins. Co.*, [1897] 2 Q. B. 93.

Joint Resolution, Title, Effect The Supreme Court of South Dakota has recently decided, that Article 13, § 19, of the constitution of that state, which provides that the presiding officer of each house shall sign all bills and joint resolutions "after the titles have been publicly read," presupposes that a joint resolution will have a title, though it does not expressly require it, and consequently, when the title to a joint resolution is adopted after due consideration, it may be referred to and considered by the courts for the purpose of ascertaining the intention of the legislature in adopting the resolution, if there is any doubt as to what that intention is, just as the title of a statute, which, under constitutional provisions, now governs the enacting part: *Lowell v. Ferguson*, 71 N. W. Rep. 765.

Libel A publication that describes a fire in the plaintiff's building, and also refers to two previous fires in the same building, concluding with the following words, "Every fire in this building has started on the upper floor, and twice in Reid's printing establishment," contains no defamatory language, and is not capable of meaning to charge the plaintiff, Reid, the owner of the printing office, with incendiarism; and when words are not in their nature defamatory, the publisher is not liable therefor, though special damages result: *Reid v. Providence Journal Co.*, (Supreme Court of Rhode Island,) 37 Atl. Rep. 637.

Negligence, Cause of Action, Practical Joke, Nervous Shock In a curious (and unprecedented) case before Wright, J., of the Queen's Bench Division, the defendant, by way of a practical joke, falsely represented to the plaintiff, a married woman, that her husband had met with a serious accident, and that both his legs were broken. This statement was made with the intent that it should be believed. The plaintiff believed it, and in consequence suffered a nervous shock which brought on an attack of illness. Upon these

facts the court held that she had a good cause of action : *Wilkinson v. Downton*, [1897] 2 Q. B. 57.

It has been recently decided by Stirling, J., of the Chancery Division, that a news agency may collect information from a public source and transmit it to subscribers to whom it is new upon the terms that they shall not communicate it to third parties; and a court of equity will enjoin a subscriber from communicating such information to a third party in breach of his contract, and will also enjoin a third party from inducing a subscriber to break his contract by supplying him with such information with a view to publication: *Exchange Telegraph Co., Ltd., v. Central News, Ltd.*, [1897] 2 Ch. 48.

The news was communicated by ticker; and the contract provided that "the news supplied by the company is to be used only in the newspapers or posted only in the club, news-room, office, or other place at which it is delivered. No copy of it shall be made for any other purpose than for such publication, and it shall not be transmitted, communicated, or delivered to any other party or parties by messenger, telegraph, telephone, or otherwise, nor shall the subscriber assign the benefit of the whole or part of this agreement, nor let upon hire the instrument or the right to use it nor in any way part with the possession of the instrument without the written consent of the company."

The only case at all similar to this is that of the *Exchange Tel. Co. v. Gregory*, [1896] 1 Q. B. 147, (35 AM. L. REG. N. S. 238 :) when the same plaintiff secured an injunction to restrain the defendant from publishing the news collected by it, which had been surreptitiously obtained by the latter.

An employe, who, while earning weekly wages, constructs with his employer's tools and materials, in his shop, machines which the latter uses as part of his tools, without knowledge of any objection thereto, cannot, after obtaining a patent, enjoin his employer from further use of the particular machines; an irrevocable license to use them will be implied: *Blauvelt v. Interior Conduit & Insulation Co.*, (Circuit Court of Appeals, Second Circuit,) 80 Fed. Rep. 906.

One who makes and sells one element of a patented combination, with the intent and for the purpose of bringing about its use in such a combination, is guilty of contributory infringement, and is equally liable with him

News Agency,
Unpublished
Information.
Copying by
Rival.
Injunction

Patents,
Invention by
Employe,
Implied
License for
Use by
Employer

Contributory
Infringement

who in fact organizes the complete combination: *Thomson-Houston Electric Co. v. Ohio Brass Co.*, (Circuit Court of Appeals, Sixth Circuit,) 80 Fed. Rep. 712, affirming 78 Fed. Rep. 139, 1896.

The principle of this case is settled by an unbroken chain of authority: *Wallace v. Holmes*, 9 Blatchf. (U. S.) 65, 1871; *Renwick v. Pond*, 5 Fish. Pat. Cas. 569, 1872; *Turrell v. Spatch*, 8 O. G. 986, 1875; *Richardson v. Noyes*, 10 O. G. 507, 1876; *Rumford Chem. Works v. Hooker*, 10 O. G. 289, 1876; *Bowker v. Doves*, 3 Ban. & Ard. Pat. Cas. 518, 1878; *Boyd v. Cherry*, 4 McCrary, (U. S.) 70, 1883; *Cotton Tie Co. v. Simmons*, 106 U. S. 89, 1882; *Schneider v. Pountney*, 21 Fed. Rep. 399, 1884; *Travers v. Beyer*, 26 Fed. Rep. 450, 1886; *Alabastine Co. v. Payne*, 27 Fed. Rep. 559, 1886; *Geis v. Kimber*, 36 Fed. Rep. 105, 1888; *Lea v. Northwestern Store Repair Co.*, 50 Fed. Rep. 202, 1892; *Thomson-Houston Electric Co. v. Kelsey Electric Ry. Specialty Co.*, 75 Fed. Rep. 1005, 1896, modifying 72 Fed. Rep. 1016, 1896.

But the mere fact that the parts thus manufactured may be used for an improper purpose is not sufficient to prove contributory infringement; it must be proved that they are intended to be so used, or that they cannot be used otherwise. *Hanes v. Strans*, 9 Blatchf. (U. S.) 553, 1872; *Keystone Bridge Co. v. Phoenix Iron Co.*, 5 Fish. Pat. Cas. 468, 1872; *Saxe v. Hammond*, 1 Holmes, (U. S.) 456, 1875; *Maynard v. Pawling*, 3 Fed. Rep. 711, 1880; *Campbell v. Kavanaugh*, 20 Blatchf. (U. S.) 256, 1882; *Snyder v. Bunncell*, 38 O. G. 1130, 1886; *Bliss v. Merrill*, 42 O. G. 97, 1887.

A statute, (Stat. Ky. § 4223,) requiring itinerant vendors of patent rights to have written across the face of the notes executed to them in payment therefor the word "Peddler's note," is a valid exercise of the police power of the state, and does not conflict with the federal laws: *Union Natl. Bk. v. Brown*, (Court of Appeals of Kentucky,) 41 S. W. Rep. 273.

The rule that income wrongfully applied by a receiver to the payment of interest on mortgages, or the improvement of the property of the corporation, must be restored, cannot be applied when it is impossible to ascertain whether these expenditures have been made out of the income, or out of money borrowed: *Central Trust Co. of N. Y. v. East Tenn. V. & G. R. R. Co.*, (Circuit Court of Appeals, Sixth Circuit,) 80 Fed. Rep. 624.

Railroads.
Receiver.
Diversion of
Income

**Crossings,
Collision with
Electric Car.
Degree of
Care,
Signals**

The Supreme Court of New Jersey has decided, that when a railroad company fails to give the proper signals of the approach of a train, and a collision ensues with an electric street railway car, the former company cannot recover from the street railway company for losses due to the collision, if its failure to give the signals contributed thereto; that the fact that the two companies have a mutual agreement providing for a derailing switch on the tracks of the electric railway, as a precaution against collision at that crossing, and also providing, that before an electric car shall be permitted to pass over the crossing the conductor of that car who shall be operating the derailing switch shall look in both directions, and listen for the approach of railroad trains, does not excuse the railroad company from giving the statutory signals as a warning of approaching trains; and that when the neglect to give such signals appears to have contributed to the collision, the railroad company cannot recover against the electric street railway company, although the conductor of the electric car who operated the derailing switch was negligent in failing to look in both directions, and to listen for approaching trains: *N. Y. & G. L. Ry. Co. v. N. J. Electric Ry. Co.*, 37 Atl. Rep. 627.

**Electric
Railroads**

A railroad upon which electricity is used as the motive power is a railroad, within a statutory provision (Code Ala., 1836, § 1145,) that when the tracks of two railroads cross each other, engineers and conductors must cause the trains of which they are in charge to come to a full stop within one hundred feet of the crossing, and not proceed until they know the way to be clear, the train on the railroad having the older right of way being entitled to cross first: *Louisville & N. R. R. Co. v. Anchors*, (Supreme Court of Louisiana,) 22 So. Rep. 279.

**Schools,
Reinstatement of Pupil,
Mandamus,
Sufficiency of
Petition**

A petition in mandamus, which seeks to compel the principal, the superintendent, and the trustees of a school to reinstate a boy in the school, is insufficient when it does not set forth all the facts, so that it might appear whether or not the suspension of the boy was wrongful, and there is no averment that application was made to any of the school authorities to have the boy reinstated: *Cochran v. Pottle*, (Court of Civil Appeals of Texas,) 41 S. W. Rep. 537.

Under a statute, (Stat. Ky. § 4141.) which provides that a sheriff shall be liable on his bond "for any misconduct or default of his deputy," a sheriff is liable for the tortious act of his deputy in unnecessarily and maliciously placing handcuffs on a prisoner, and leading him through the streets of a city while thus handcuffed: *Shields v. Pflanz*, (Court of Appeals of Kentucky,) 41 S. W. Rep. 267.

Sheriff,
Liability for
Tort of
Deputy

An agreement between two rival applicants for a street railway franchise to combine in order to prevent competition between themselves or by others in procuring the franchise, and to avoid the imposition of conditions by the municipal authorities, is void as against public policy; and equity will not compel the specific performance of such a contract, so as to compel one of the parties to share with the others the fruits of their combination: *Hyer v. Richmond Traction Co.*, (Circuit Court of Appeals, Fourth Circuit,) 80 Fed. Rep. 839.

Specific
Performance,
Illegal
Contract,
Public Policy

An insurance company cannot be subrogated in case of loss to the insured's right of action against one who sold him the insured property through fraudulent misrepresentations of its value: *Farmers' Fire Ins. Co. v. Johnston*, (Supreme Court of Michigan,) 71 N. W. Rep. 1074.

Subrogation,
Insurance

According to a recent decision of the Supreme Court of Louisiana, the authority to sue the state, granted by the legislature, includes also the authority to prosecute the suit to judgment, and the authority to keep the judgment in force; and consequently to revive the judgment by action before it is barred by prescription: *Carter v. State*, 22 So. Rep. 400.

Suits Against
State,
Revival of
Judgment

The Court of Civil Appeals of Texas holds that a father who does not permit his minor son to use a gun is not responsible in damages for the act of the son in carelessly and purposely shooting at and injuring a companion, while out hunting with an air-gun, without his father's knowledge: *Ritter v. Thibodeaux*, 41 S. W. Rep. 492.

Torts,
Responsibility
of Father for
Acts of Child

The purchase of a toy air-gun by a father for his child is not an act of culpable negligence, since it is not obviously and intrinsically dangerous; and consequently the father is not

liable for the wrongful act of another boy, who obtains it without his knowledge or consent, and uses it so as to injure another: *Chaddock v. Plummer*, 88 Mich. 225, 1891; *Harris v. Cameron*, 81 Wis. 239, 1892.

The father of a child, who is its natural guardian, has such a right to its dead body that he may maintain an action against one to whom he entrusted the child for treatment, and who, without his consent, performed an autopsy on the dead body: *Burney v. Children's Hospital in Boston*, (Supreme Judicial Court of Massachusetts,) 47 N. E. Rep. 401.

A widow may recover for the unlawful mutilation of her deceased husband's body by an unauthorized autopsy or dissection: *Larson v. Chase*, 47 Minn. 307, 1891; *Foley v. Phelps*, 1 App. Div. (N. Y.) 551, 1896; and a husband may recover for the unlawful dissection of the body of his wife: *Anon.*, 3 Chic. L. News, 378, 1871. But in the absence of proof of fraudulent or malicious motive, neither a coroner, who has the power of ordering an autopsy, nor the physician who performs it by his order, can be held liable therefor: *Young v. College of Physicians & Surgeons*, 81 Md. 359, 1895.

A patron of a place of amusement, who has paid his admission fee, and has not by his conduct forfeited his right to remain, is not bound to leave on request of the proprietors; if he refuses to leave, they have no right to eject him; he is entitled to resist ejection with all the force necessary to protect himself; and if they do eject him, he can recover damages: *Cremore v. Huber*, (Supreme Court of New York, Appellate Division, Second Department,) 45 N. Y. Suppl. 947.

According to a recent decision by Coxe, Dist. J., in the Circuit Court for the Southern District of New York, "where the goods of a manufacturer have become popular not only because of their intrinsic worth, but also by reason of the ingenious, attractive and persistent manner in which they have been advertised, the good-will thus created is entitled to protection. The money invested in advertising is as much a part of the business as if invested in buildings, or machinery, and a rival in business has no more right to use the one than the other,—no more right to use the machinery by which the goods are placed on the market than the machinery which originally created them:" *Hilson Co. v. Foster*, 80 Fed. Rep. 896.

Ardenus Stewart.

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TERMINATION OF OFFICE; PUBLIC OFFICER; ACCEPTANCE OF AN INCOMPATIBLE OFFICE. The question of the termination of the authority of a public officer by reason of his acceptance of an incompatible office, has recently been passed upon by the Supreme Court of Michigan in the case of *Attorney-General ex relatione Moreland v. Common Council of City of Detroit*, 70 N. W. Rep. 450 (March 19, 1897). Pingree, mayor of Detroit, having been elected governor of Michigan, attempted to exercise the functions of both offices. The question as to his right to do so having come before the court, it was held that the offices of mayor of a city and governor of a State are incompatible, and cannot be occupied by one and the same person at the same time, and Pingree, having accepted the office of governor, the office of mayor thereby became vacant. This decision is in accordance with the common law rule on the subject, that when the occupant of one office accepts another incompatible with the first, he thereby vacates the first office, and his title thereto is *ipso facto* terminated without any further act on his part, and without any judicial or other proceedings. While the rule is very clear, the application of it has been far from uniform,

partly due to statutory provisions and partly due to different views of judges as to what constitutes incompatibility. Thus, in New York, a retired army officer may act as Aqueduct Commissioner: *People v. Duane*, 121 N. Y. 367, 1890; while in Texas he may not act as mayor of a city: *State v. DeGress*, 53 Texas, 387 (1880). In Indiana an officer of volunteers may not act as Auditor of the county: *Mehring v. State*, 20 Ind. 103 (1863); while in Iowa he may act as District Attorney: *Bryan v. Cattell*, 15 Iowa, 550 (1864).

It is to be noted that the above rule applies to offices under the same sovereignty and that, therefore, the acceptance of an office existing under a State law, does not vacate an office existing under a national law: *Felts v. Kerlin*, 105 Ind. 222 (1885); *DeFurk v. C. W.*, 129 P. S. 151 (1889). But if the incumbent elects to hold the latter he must surrender the former: *People v. Leonard*, 73 Cal. 230 (1887). The state courts will declare a state office vacant on the acceptance by the incumbent of a Federal office of the prohibited class: *Dickson v. People*, 17 Ill. 191 (1855); *People v. Brooklyn*, 77 N. Y. 503 (1879).

WILLS; RESTRAINTS ON ALIENATION. In the case of *Morse v. Blood*, 71 N. W. 682, Minn. (June 8, 1897), the testator left his entire property to his wife, "on condition that in no case shall she give or bequeath one cent of said estate to any member of my family or any relation of her own." Though it is generally held that a condition in restraint of alienation to particular classes of persons is good, the court said that such a condition should not be allowed where it is so vexatious as to prevent any alienation for a limited time. The effect of such a condition as the above would be to tie up the real estate during the widow's life, for no purchaser could safely take it, when it might be forfeited at any time by the widow giving a drink or other trifling gift to any of the forbidden persons. And, moreover, if the estate was forfeited by her gift or devise, it would revert to the testator's heirs, who were the very persons he desired to exclude. The court therefore held this condition void as being inconsistent with the grant of a fee, and also as being inconsistent with itself. A provision in almost the same language, "That my widow shall not will to any of my blood kin or hers any of the estate," was held void, as inconsistent with the nature of the estate, in *Barnard's Lessee v. Bailey*, 2 Har. (Del.) 56 (1835), and in *Ludlow v. Bunbury*, 35 Beav. 36 (1865), a condition made by the wife that if (B.), his wife, or descendants, acquire any interest, the whole estate of the husband should cease, was held void.

The rule allowing partial restraints on alienation, is, it must be remembered, an exception to the general policy of the law and the principle of the above cases in establishing an exception to that rule, and returning to the rule of public policy, seems to be that such conditions should not be permitted where, though partial, they

are unreasonable, and have the effect of depressing the market.

WILLS; REVOCATION BY SUBSEQUENT MARRIAGE.
The Court of Wisconsin has recently decided in *W. 362* (May 21, 1897), that under the Statute which give married women the absolute right to dispose of property by will, the will of a single woman is not revoked by subsequent marriage.

The common law rule was that the will of a man, made in the course of his life, and standing alone, was sufficient to revoke a previous will. *Dick. 445* (1771); *Doe d. White v. White*, 10 B. & C. 181 (1815). But the will of a woman was not so. *Forse v. Hembling*, 4 Rep. 60 (1588). The reason for this was, in the case of a man, only such a change in the course of descent was held sufficient to revoke his will; while, in the case of a woman, by destroying her right over her property, the nature of her previous will. Therefore, a woman's will, being unable to retain one of its essential elements, was revoked by marriage. Where, however, a woman has the right to devise during coverture, by the Statute, she has thereby the right to alter the previous will, and that will is not revoked by her subsequent marriage. *Holland*, 88 Ky. 40 (1888).

Following this idea, that the common law reason for it ceased, the court, in the present case, held that since a married woman is now, in all States, empowered to will as freely as if she were single, the revocation of her will should be the same as in the case of a man. In other States, where marriage is necessary to revoke a man's will, the same rule has been held equally necessary for a woman's will: *Asiller v. Phillips*, 9 R. I. 137 (1881); *Webb v. Jones*, 60 N. H. 439 (1881); *Webb v. Jones*, 55 Mich. 173 (1889); *Roane v. Hollins*, 79 Ill. 99 (1889). In *Re Tuller's Will*, 79 Ill. 99 (1889), the reason of the rule of implied revocation at the birth of issue, in England, and marriage in this country, and that therefore, in this country, that marriage alone, of a man's will, as husband and wife, but that where the marriage did not alter the course of descent, and that therefore, in this case, where the devisees were the heirs, and therefore heirs, there was no principle was followed in *Re Ward*.

but in the case under discussion the court said the question of inheritance was immaterial, and laid down the rule that marriage alone was never sufficient to revoke a woman's will.

On the other hand, in Massachusetts, though admitting that the law should be uniform as to both sexes, the court held that the fact that it was wrong about a man's will, and required both marriage and birth of issue to revoke, when it should, on the principle of *Re Tuller's Will*, (*supra*,) require only marriage, was no reason to make it also wrong about a woman's will; and that as the statute said, "Nothing shall prevent revocation by implication from changed circumstances," that re-enacted the common law, and made the marriage of a woman revoke her will, and the question of the reasonableness of the statute could not be considered: *Sloan v. Hammon*t, 138 Mass. 45 (1884); *Blodgett v. Moore*, 141 Mass. 75 (1886). *Brown v. Clark*, 77 N. Y. 369 (1879), decided that as the New York statute said that the will of an unmarried woman should be revoked by her subsequent marriage, the rule embodied in the statute could not be dispensed with, because the reason on which it was established had ceased, by a subsequent statute giving married women power to will. But, as the reason for it has ceased, the statute is construed strictly, and held not to apply to the will of a married woman who remarries: *McLarney v. Phelan*, 90 Hun, 361 (1895).

England and Pennsylvania have statutes expressly declaring that the marriage of a man or woman revokes a previous will (in Pennsylvania only in proportion to the interest of the husband or wife under the Intestate Act). Some states have followed their example, while others, without a direct statute have interpreted the reason of the common law as in *Re Tuller*, *supra*, that marriage in this country by altering the course of descent changes a man's or a woman's circumstances, and in so far as it alters the course of descent, and no further, operates as a revocation of a will. See *Brown v. Sherrer*, 41 Pac. 668 (Colo. 1895).

BOOK REVIEWS.

THE ELEMENTS OF JURISPRUDENCE. By THOMAS ERSKINE HOL-
LAND, D. C. L. 8th Edition. New York: The MacMillan Co.
London: MacMillan & Co., Ltd. 1896.

Holland on Jurisprudence is an old friend. Students of the Eighth Edition will find the grand divisions of the work substantially unchanged. Many improvements, however, have been made in minor matters. The five parts of the work are "Law and Rights;" "Private Law;" "Public Law;" "International Law;" "The Application of Law." "Many references," says the author in his preface, "have now been made to the new Civil Code for Germany, which became law last month. This great work, the result of twenty years of well directed labour, differs ma-

terially from the draft Code, to which allusions will be found in the sixth and seventh editions. Few more interesting tasks could be undertaken than a comparison in detail of this finished product of Teutonic legal science with the Code Civil, which has so profoundly affected the legislation of all the Latin Races." The work has also been brought down to date (or brought up to date—according to one's conception of the trend of events) in respect of the citation of recent decisions of importance. On page 304 we note *Broderip v. Salomon*—although when the book went to press that case had not yet been decided by the House of Lords. As illustrating the subject of acceptance of offers the author cites the curious and now familiar case of *Carlill v. Carbolic Smoke Ball Co.*

(Of the substance of the work itself it is unnecessary at this time to speak. It is so well known to students that it may be said to have accomplished its own introduction, and it needs not that any man should perform such an office for it. While Part I. is an admirable piece of exposition, the author is perhaps at his best in his discussions of Private Law and of Public Law in Parts II. and III. The student can perform no more profitable exercise than to compare Dr. Holland's treatment of the subject of International Law as contained in Part IV. with the extremely interesting and suggestive address on International Law, recently delivered by Mr. Frederic R. Coudert, before the law students of the University of Pennsylvania, and now published in the AMERICAN LAW REGISTER AND REVIEW (36 N. S. page 353).

Now and then one finds a statement of principle which could have been made more striking (because more accurate) by a somewhat fuller statement than that which the author has accorded it. This is the only critical suggestion which it seems fair to make—apart of course from all discussion of those important matters of substance in regard to which jurists are divided. An illustration of a case in which a statement might have been slightly amplified with advantage appears on page 271. The author, after defining policies of insurance against fire or marine risks as contracts to recoup a loss which parties may sustain from particular causes, says "When such a loss is made good *aliunde*, the companies are not liable for a loss which no longer exists." He cites *Darrell v. Tibbitts*, 5 Q. B. 11, 560. It would have been well, perhaps, to say that the companies' liability ceases only when the insured is made whole by the enforcement of a *right*—as distinguished from the case in which he may have become the recipient of a *gratuity*. See *Burnand v. Rodocanachi*, 7 App. Cas. 333.

The student's library, no matter how small, should contain Dr. Holland's book. The approved method of studying law in England and in the United States has been for generations a method which called upon the student to begin his work in the office of the clerk of the court by familiarizing himself with the practical working of legal remedies. Next in order it was thought proper for him to study (still in a so-called "practical" way) the *right* in

respect of which the remedy exists. He has never been encouraged to push his studies farther back, with a view to investigating ultimate juristic theories of right and liability—lest his mind should become unfitted for the daily routine of the law office. He has been advised not to study jurisprudence or to waste his time with mere “theory”—for the reason, among others, that such study is a thing of which the Civilians have a monopoly. It has been like the Protestant elimination of the symbol of the cross from ecclesiastical architecture in consequence of the Catholic retention of it. Fortunately the state of mind which makes such things possible is everywhere passing away. The student now learns what a contract is before he is instructed in the mechanics of an action of assumpsit. The next step in educational reform is to enable him to work out a theory of obligation before calling upon him to grasp the common law conception of contract. It is at this stage of the development of legal education in this country and in England that the eighth edition of Holland's *Jurisprudence* appears. Its appearance is timely. It deserves and will unquestionably receive a hearty welcome.

G. W. P.

THE ANNUAL ON THE LAW OF REAL PROPERTY. Edited by THURMAN E. BALLARD and EMERSON E. BALLARD. Vol. IV. 1895. Crawfordsville, Ind.: The Ballard Publishing Co. 1897.

Though the increasing number of law books has far overstepped the limits of the lawyer's time, patience, or pocket, the value of such works as Mr. Ballard's *Digest* should not be overlooked. Real Property is of such pre-eminent importance to the lawyer, that a digest devoted solely to that branch of the law cannot fail to be of use to him.

The plan of the compilers is to annotate and epitomize all the current case and statute law on real property, to compare the decisions and laws of different states, and to report in full a few of the most important cases. There are thirteen cases so reported in this volume. This vast material is first divided alphabetically into the main subjects of real property law, and then subdivided into sections arranged so as to make each subject read as a connected article.

Thus, the subject of Abutting Owners begins with the syllabus and opinion of the court in *P. R. R. v. Montgomery Co. Pass. Ry. Co.*, 167 Pa. 62 (1895), the opinion being divided into sections according to the points decided. Then follows a brief note of the case, and an epitome of all the cases on Abutting Owners, decided in 1895, grouped into sections, each section forming a note on one particular point of the subject. Where the law varies in different states, we find a full statement of the statutory provisions of all the states or an abstract of such provisions as, for instance, in the article on Powers of Attorney (§§ 589-631). The text of the book is followed by an index of statutes referred to in

the cases epitomized, and a complete index of the four volumes of the work.

We will find that some subjects in this book are very concisely dealt with, Equity being disposed of in three sections, and Evidence in eighteen, while, on the other hand, Eminent Domain has thirty-three sections, including four fully reported cases. From these dry statistics may be gathered the magnitude of the work and the labor involved in its preparation. The difficulty with such an enormous task is that the work must of necessity be very hasty, and important questions will escape notice, statements being made which would not be supported on further investigation. An Iowa case is authority for the remark: "The rule in Shelley's Case cannot be invoked to defeat the intention of the testator" (§ 254). Though, of course, the best authorities have always held the contrary, the editor suffers this case to pass without comment, while, on the other hand, such platitudes are indulged in as (§ 258) "Vested remainders may be conveyed," and three cases are cited to support this startling proposition.

As a digest of all the real property cases decided in any given year, this book is highly satisfactory, but as an authority on the Law of Real Property to take the place of a good text-book, it cannot be relied upon.

R. A.

THE NEGOTIABLE INSTRUMENTS LAW. Drawn, Annotated and Edited by JOHN J. CRAWFORD, of the New York Bar. New York: Baker, Voorhis & Co. 1897.

This work is indicative of a tendency, which has been growing more and more apparent throughout the United States, to bring the statutory provisions of the several states to as great a degree of uniformity as possible, especially in the realm of commercial law.

The chief factor in obtaining this result has been the Conference of Commissioners on Uniformity of Laws. In 1895 the Commissioners took in hand the subject of bills and notes, and Mr. Crawford was eventually appointed to draft a bill covering this important field. The bill as drawn and adopted by the Commission has been enacted by the Legislatures of New York, Connecticut, Colorado and Florida. In these states, therefore, Mr. Crawford's book will be of the utmost importance, as it not only contains the text of the existing law, but being fully annotated, with reference to the intention of the Commissioners, it will materially aid in the interpretation of the act.

This, of course, is its primary object and will prove its chief source of usefulness. As, however, the work is largely a codification of the Common Law rules, and, as the decisions are cited wherever the former law has been adopted, the book will be found to contain a collection of authorities which will be serviceable in any state.

While the greater portion of the work done by such bodies as the Conference of Commissioners consists in crystallizing the law

and sending it forth in a logical and proper form, so that it may be the more easily consulted and readily comprehended, not the least advantage accruing to the profession and to the public at large from their endeavors is to be found in the careful discussion given to controverted theories and the final adoption of a certain and intelligent rule. A single example of a much mooted question, which has been definitely settled in the present work, will suffice to show the beneficial effect of such deliberations. Take, for instance, the subject of anomalous indorsements, upon which the courts in different jurisdictions have entertained such opposite views, one treating the writer of an irregular or anomalous indorsement as a joint maker of the note, another as a guarantor, another as an indorser, and a fourth as a second indorser, while in England his act is regarded as having no legal effect.

The confusion arising from such a conflict of authority is certainly to be deplored. It has been done away with, however, in those states which have adopted this well drawn law and the ably considered decision of the Commission to the effect that an irregular indorser should, in reason and sound law, be treated as a second indorser will go far, perhaps, to settle the trend of opinion in the matter. In fact, wherever the courts have failed to agree, the different theories have been compared, and that one having most to recommend it adopted. As Mr. Crawford's book gives the reasoning by which the Commissioners arrived at their conclusions, it will be of assistance in jurisdictions where a given question is still open to judicial determination.

M. L., Jr.

PROBATE REPORTS ANNOTATED. By FRANK S. RICE. Vol. I. New York: Baker, Voorhis & Co. 1897.

The above is the initial volume of a new series of reports which are to be the successors of the "American Probate Reports." Their plan is stated to be, to give in an annual volume contemporaneous or recent decisions of the courts of the different states upon all matters cognizable in Probate and Surrogate courts, of general value to the profession. The editors propose to exclude all cases which "carry their own solution in the mere statement of the facts that underlie them" and to present only those "that embody the more intricate phases of probate litigation;" to give dissenting opinions where they rest upon fine distinctions and present the *contra* view convincingly; and to report all cases promptly, regardless of their appearance in official form. On the whole, the scheme of the work is well considered, and, if properly carried out, should result in a series of reports of great value to every lawyer.

But the present volume is marred by some unfortunate defects, sometimes suggestive of careless proof-reading, and sometimes of hasty preparation of the subject-matter; while the abridged quotations from Schouler, *Dem. Rel.*, (P. 569, l. 43) and 3 Johns. Ch. 481 (l. 570, l. 4) are most ambiguously worded and convey no

idea of the statement in the original. Further, the annotation seems at times unnecessarily profuse; five pages of fine type are devoted to the Doctrine of Estates Tail, yet the author himself says (p. 11) that the universal opposition of courts and legislatures to their existence "renders the entire subject of little practical importance" in this country. In this note the author names seven states which have abolished estates tail or converted them into fees simple, but no mention is made of Pennsylvania, in which, by the Act of April 27, 1855, estates tail were converted into fees simple; though the case to which this note is appended is from Pennsylvania: *Ralston v. Truesdell*, 35 Atl. Rep. 813 (Nov. 11, 1896). On the other hand, the most important topic of implied trusts is disposed of in a note of only one page in length, and is in consequence very inadequately treated. Moreover, the editor does not distinguish clearly between resulting and constructive trusts: his definition is, "Implied trusts arise where the intent to create is a logical inference on the language of the instrument." This, of course, does not include constructive trusts, where the intention of the parties is often entirely disregarded. In the otherwise excellent note on the rule in Shelley's Case, the editor says: "It is exceedingly doubtful if any equity court in this country would enforce its (the Rule's) provisions in an extreme case, and it is certain that it is very generally regarded rather as a rule of construction than as a rule of law; that is to say, its rigors are abated in all instances when its enforcement would contravene the manifest intention of the testator." This broad statement will surprise lawyers in some jurisdictions; notably in Pennsylvania, in the light of *Heister v. Yerger*, 166 Pa. 445 (1895), and *Grimes v. Shirk*, 169 Pa. 74 (1896).

It is unfortunate that these blemishes should appear in a work on the whole so valuable and well prepared, and we hope the succeeding volumes of the series will retain all of the merits of the present one while eliminating its faults.

M. H.

BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked * will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.]

TREATISES.

DOMESDAY BOOK AND BEYOND. THREE ESSAYS IN THE EARLY HISTORY OF ENGLAND. By FREDERIC WILLIAM MAITLAND, LL.D., Downing Professor of the Laws of England in the University of Cambridge, of Lincoln's Inn, Barrister-at-law. Boston: Little, Brown & Co. 1897.

COMMENTARIES ON THE LAWS OF ENGLAND. FOUR VOLUMES. By SIR WILLIAM BLACKSTONE. Edited by WILLIAM DRAPER LEWIS, PH.D., Dean of the Department of Law of the University of Pennsylvania. Philadelphia: Rees Welsh & Co. 1897.

THE LAW OF SALES OF PERSONAL PROPERTY. By FRANCIS M. BORDICK. Dwight Professor of Law in Columbia University School of Law. Boston: Little, Brown & Co. 1897.

SELECTED CASES.

GENERAL DIGEST, AMERICAN AND ENGLISH. No. 3 to April, 1897. Rochester, N. Y.: Lawyers' Co operative Publishing Co.

AMERICAN ELECTRICAL CASES, WITH ANNOTATIONS. Edited by WILLIAM A. MORRILL. Vol. VI. 1895-1897. Albany, N. Y.: Matthew Bender. 1897.

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No. 10.

THE PRINCIPLES OF THE LAW RELATING TO CORPORATE LIABILITY FOR ACTS OF PRO- MOTERS.

CHAPTER IV.

RATIFICATION.

§ 1. *On theory, ratification inapplicable in order to charge a corporation for acts prior to incorporation.*

It will have been noticed, in discussing the cases on this subject, that the courts frequently use the term "ratification;" indicating that a corporation may, by ratifying a contract made by its promoters, become liable to perform its terms, though the contract was made before it came into existence.

Ratification is a term originating in the law of agency, which may be used with its scientific intendment, when saying that the act of an agent, or the act of one holding himself out as an agent, has been ratified. It is "an agreement to adopt an act performed by another for us," and is either express or implied.¹ But that there may be a ratification in a technical legal sense, the one purporting to ratify an act must have been in existence at the time the act was done,² for in theory this adoption of an act done by another is only possible because the act was done on our behalf, and it cannot be said in any

¹ Bouvier's Law Dictionary.

² Anson on Contracts, * 335-36; Chitty on Contracts, p. 293.

true sense that an act was done on behalf of a person not *in esse*.

As is said by Pollock:¹ "When a principal is named or described, but is not capable of authorizing the contract so as to be bound by it at the time, there can be no binding ratification, for ratification must be by an existing person on whose behalf a contract might have been made at the time."

It is difficult to perceive, therefore, how this doctrine of agency can be applied, (with any due regard to an exact use of scientific terms,) in order to charge a corporation for having knowingly taken the benefit of a contract made before its existence commenced. The better opinion seems to coincide with this view, and in the leading case of *Kelner v. Baxter*,² Willis, J., said: "Could the company become liable by a mere ratification? Clearly not. Ratification can only be by a person ascertained at the time of the act done, by a person in existence either actually or in contemplation of law, as in the case of the assignees of bankrupts, or administrators whose title for the protection of the estate vests by relation."

The cases denying the applicability of the doctrine of ratification are numerous, and would seem to have the weight of reason and authority,³ for, under the circumstances, privity of contract is impossible.

It is, nevertheless, true that the doctrine of ratification has been made use of in a number of cases,⁴ and where it is employed it would seem that the rule of agency, (that where a contract is ratified, the agent, if he has contracted as such, is relieved from responsibility,) is invoked to discharge the pro-

¹ Contracts, * 107.

² L. R. 2 C. P. 173 (1866).

³ *Melhado v. Porto Alegre R. R. Co.*, 9 C. P. 503 (1874); *In re Empress Engineering Co.*, L. R. 16 Ch. Div. 125 (1880); *Weatherford R. R. v. Grainger*, 24 S. W. 795 (Texas, 1894); *McArthur v. Times Co.*, 57 N. W. 216 (Minn. 1892); *Gunn v. Assurance Co.*, 12 C. R. N. S. 694 (1862); *In re Northumberland Ave. Hotel Co.*, 33 Ch. Div. 16 (1886).

⁴ *Carey v. Des Moines Coal Co.*, 47 N. W. 882 (Iowa, 1891); *Bruner v. Brown*, 38 N. E. 318 (Ind. 1894); *Buffington v. Bardon*, 50 N. W. 776 (Wis. 1891); *Stanton v. R. R. Co.*, 59 Conn. 272 (1890); *Faxton Cattle Co. v. Bank*, 21 Neb. 621 (1887); *Hill v. Gould*, 129 Mo. 106 (1895). Dictum.

moter of personal liability on the contract. Such, at least, was the intimation in *Whitney v. Wyman*,¹ though we have seen that ordinarily the rule is otherwise.²

In *Buffington v. Bardon*³ the laxity of thought which an adoption of this theory necessitates is clearly brought out. That was an action by Buffington to charge the defendants, as stockholders of a corporation, upon a contract which plaintiff alleged that he made with the company. The lower Court instructed the jury that, before they could render a verdict for the plaintiff, they must find that the corporation promised to pay the plaintiff for his services, or that after it was organized the corporation or its authorized agents, knowing all the facts, adopted the services and made use of the same. Verdict was rendered for plaintiff. Lyon, J., held: "The law is that a corporation is liable for its own acts only after it has a legal existence. Until that time no one, whether a promoter or not, can sustain to the corporation the relation of agent. Were this not so, we would have an agent without a principal, which is an absurdity. But if one assumes to act as agent for a prospective corporation, and in form enters into a contract in its behalf, it is competent for such corporation, when organized, to ratify such contract. If with full knowledge of all the facts, but not otherwise, the corporation assumes the contract and agrees to pay the consideration, or accepts the benefit of the contract it will be bound thereby."

Though the language of the lower Court was referred to as being correct, judgment was reversed on the ground that there was no evidence which could have been submitted to the jury tending to prove a ratification with knowledge of all the facts.

While the learned judge in this case justly characterizes as absurd the theory that the promoters are agents of the company, it would seem that he has fallen into a like mistake when he boldly asserts that the technical theory of ratification is applicable to a case in which, as he admits, there is no

¹ 101 U. S. 392 (1879).

² Ante.

³ 30 N. W. 776 (Wisc. 1891).

relation of principal and agent and no principal in existence for whom anyone might assume to act as agent.

§ 2. *Where doctrine recognised, knowledge of facts a prerequisite to liability.*

Where the doctrine is employed, however, one of the prerequisites should be, as the above case lays down, that the corporation must have had knowledge of all the material facts and circumstances of the transaction which it is charged with having ratified, for otherwise, according to the law of agency, no ratification is possible.¹ This rule is recognized in the cases.²

§ 3. *Only acts within scope of the corporate powers can be ratified.*

It is also laid down that only acts within the scope of the corporate powers can be ratified.³ Under the doctrine of "special capacities," according to which any act done without the scope of the powers conferred upon the corporation, is no act, (for there was no power with which to act,) this statement would be literally true. The corporation could not ratify a transaction which was beyond the powers granted, for it has not the inherent force so to do. As a corporate act, ratification could not take place.

But since ratification is purely a question of fact depending in any given case upon the intention of the parties as manifested by their acts and words, ratification is physically possible (if the expression may be permitted) and the above proposition must not be understood in any such sense as that the act of ratification is one implied by law, and that the law will not raise the implication where the act, if done by the corporation, would have been *ultra vires*.⁴

¹Story on Agency, § 239.

²Stanton v. R. R., 59 Conn. 272 (1890).

³Stanton v. R. R., 59 Conn. 222 (1890); Munson v. R. R. Co., 103 N. Y. 58.

⁴Oakes v. Cattaraugus Water Co., 143 N. Y. App. 430 (1894); Howard v. Patent Ivory Mfg. Co., L. R. 38 Ch. Div. 156 (1888).

§ 4. *Ratification relates back.*

Ratification, as we have seen, is the adoption of an act previously done by one who was, in fact, agent for the ratifier, or who assumed to act as agent for one who was in existence at the time. It follows, therefore, that ratification relates back to the time of the act, and the principal is bound or acquires rights as of that date; ¹ *omnis ratihabitis retrohabitur*. So the obligation binding a corporation, which has ratified a contract made by its promoter, dates as of the time of the original agreement.² It is the adoption of the old contract, not the making of a new one.

§ 5. *What acts constitute a ratification.*

As to what constitutes a ratification, it need only be said that the same rules apply in these cases as in those where the term is more truly applicable. It may be express, or implied from carrying out the terms of the contract or acting with reference to it.

CHAPTER V.

ADOPTION.

§ 1. *Conceived of as the adoption of an old contract.*

Many cases, while denying that there can be in any exact sense a ratification, assert that a company may become bound by adoption.³ This is not a "term of art;" there is no recognized legal principle so-called, and it is to a consideration of

¹ *Kelner v. Baxter*, L. R. 2 C. P. 174 (1866).

² *Stanton v. R. R.*, 59 Conn. 272 (1890); *Negley v. Lindsey*, 67 Pa. 218 (1872); *Low v. R. R. Co.*, 45 N. H. 370 (1864).

³ *Pittsburgh v. Quintrell*, 30 S. W. 284 (Tenn. 1892); *Huron Printing Co. v. Kittleson*, 57 N. W. 233 (S. Da. 1894); *Schreyer v. Turner Flouring Mills*, 43 P. 719 (Oregon, 1896); *Weatherford R. R. Co. v. Granger*, 24 S. W. 795 (Texas, 1894); *Colorado Land & Water Co. v. Adams* (Colo. 1894); *Arapahoe Ins. Co. v. Platt*, 39 P. 584 (Colo. 1895); *Battelle v. Cement Co.*, 33 N. W. 327 (Mo. 1887); *McArthur v. Printing Co.*, 51 N. W. 216 (Minn. 1892); *Pratt v. Oshkosh Co.*, 62 N. W. 84 (Wisc. 1895); *Munson v. R. R.*, 103 N. Y. 58 (1886); *Burden v. Burden*, 4 N. Y. Supp. 499 (1896); *Touche v. Metropolitan Co.*, 6 Chan.App. 671 (1870); *Bommer v. American Spiral Hinge Co.*, 81 N. Y. 469 (1880); *Pa. Match Co. v. Hapgood*, 141 Mass. 145 (1886).

what is meant by the courts when they say that a corporation may adopt the contract and become bound thereby, that we must now proceed.

An examination of the cases would seem to indicate that the term has been used in two distinct senses. In some it has signified, as the word itself denotes, an adoption of a previously formed contract; the assumption by the corporation of the rights and liabilities created by a contract made between a promoter and a third person. In others, the Court has shown, either expressly or by implication, that it meant by "adoption" the making of a new contract with the same terms as the old.

The former of these conceptions was undoubtedly in the mind of the Court in the case of *Rogers v. Land Co.*¹

A number of persons holding a large tract of land agreed to form a company whose sole purpose should be the disposal of the land in question. Each should contribute his proportion of the land to the company, receiving in return script to represent shares in the company, which should be retired as fast as the company disposed of the land.

When the company was created, instead of paying off the script it declared a dividend to the scripsholders. The suit was brought by one of the scripsholders to compel the payment to be made to the retirement of the script.

Vann, J., held: "By accepting title to the land, it (the corporation) adopted and ratified the agreement entered into by all its stockholders and thereby voluntarily made itself a party thereto and became bound thereby," and the Court thereupon ordered that the agreement between the original owners was binding upon the company and that profits must therefore, be applied to retiring the script. See also²

When this is understood, by "adoption" it is manifest that there is little or no distinction to be drawn between it and "ratification" as the latter term is employed in this connection.

¹ 34 N. Y. 197 (1892); *Spiller v. Paris Skating Rink Co.*, 7 Ch. Div. 368 (1878); *Match Co.*, 62 N. W. 84 (Wisc. 1895); 15 Law & Eq. 596 (1852).

² *Oakes v. Cattaraugus Water Co.*, 143 N. Y. App. 430 (1894); *Pratt v. Oshkosh*, 62 N. W. 84 (Wisc. 1895); *Gooday v. Colchester & Stour Valley Ry. Co.*, 17 Beavan, 132 (1852); *Touche v. Metropolitan Ry. Co.*, 6 Ch. App. 671 (1870).

In their exact signification, adoption denotes the taking to one's self of that with reference to which there existed no prior relation; ratification, the confirmation of an act done without due authority on behalf of an existing principal. But when the term ratification is made use of in a case in which no relationship of principal and agent exists, then, according to the definitions given, there is nothing left whereby to distinguish the two processes. Whatever constitutes a ratification in this sense constitutes also an adoption, and the terms may be used as synonymous. See¹

This conception seems to be open to the objection that the law of contract does not permit of a stranger substituting himself for one of the original parties to a contract except by an agreement between all of the parties concerned, based upon a sufficient consideration. This is on the familiar principle that liabilities cannot generally be assigned.²

Now, if we suppose a case in which the corporation has so acted after coming into existence, that under the decisions we are discussing a Court would say that there had been an adoption of the contract, would it not be a mere fiction unsupported by the facts for the Court to imply that the minds of the parties had met and agreed upon the substitution of the liability of the corporation for that of the promoter?

Yet by such mutual agreement alone, according to the law of contract, can a substitution of liabilities take place.

But admitting that a Court would be justified in giving effect to such a substitution on the ground of an implied agreement between the parties to that effect, we are not aided in understanding these decisions, for in none of them does the Court seem to base its result on the reasoning indicated. Indeed, they appear to repudiate it, for such a substitution is, in the words of Anson,³ "the rescission by agreement of one contract and the substitution of a new one in which the same acts are to

¹ *Perry v. Little Rock R. R. Co.*, 44 Ark. 383 (1884); *Schreyer v. Turner Flouring Mills Co.*, 43 P. 719 (Oregon, 1896); *McArthur v. Times Printing Co.*, 51 N. W. 216 (Minn. 1892).

² Anson, Part III., Chapter II.

³ *Contracts*, p. 287.

be performed by different parties," but the cases under consideration all take the view that the contract binding the corporation is not a new one, but is the old agreement adopted, dating back and taking effect as of the time of the original contract.

A number of cases, however, expressly repudiate the idea and hold that there can be no adoption of the original contract or liability assumed by the corporation under it; and the view may be considered discredited.¹

§ 2. *The making of a new contract.*

The better opinion as to the nature of this so-called "adoption" is, that it is the making of a new contract between the corporation and the person with whom the promoter contracted, and since it is usually implied from the actions of the company with reference to the promoter's contract, it is generally found that it was the intention of the parties to follow the terms of the original agreement. Hence the rule laid down in the cases, that adoption, is "the making of a new contract with the same terms as the old."²

The distinctions taken between the theories of "ratification," "adoption" (understood in its *prima facie* significance), and "adoption" (understood as the making of a new contract), are rather of theoretical than of practical importance in the majority of cases. They become useful, however, wherever the Statute of Frauds or of Limitations is involved. An example of this is the case of *McArthur v. Times Printing Co.*³ That was an action for damages for breach of contract. Promoters of the company had employed plaintiff in behalf of the company as advertising agent for the period of one year from and after October 1st. Plaintiff commenced to render his services on that day, though incorporation was not complete. He

¹ *Abbott v. Hapgood*, 150 Mass. 248 (1889); *R. R. Co. v. Sage*, 65 Ill. 328 (1872); *Western Screw Co. v. Coumley*, 72 Ill. 531 (1874).

² *In re Empress Engineering Co.*, 16 Ch. Div. 125 (1880); *Northumberland Ave. Hotel Co.*, 33 Ch. Div. 16 (1886); *McArthur v. Times Printing Co.*, 51 N. W. 216 (Minn. 1892).

³ 51 N. W. 216 (Minn. 1892).

continued in the same employment for some time after the company was formed, but was discharged within the year. All the officers and directors knew the terms of the contract, and plaintiff had been paid accordingly, but no formal action had been taken by the company, recognizing the contract.

One of the grounds of defense was that the contract was void on account of the Statute of Frauds, there being no memorandum in writing, and performance not being provided for within the year.

Mitchell, J., held: "This Court, in accordance with what we deem sound reason as well as the weight of authority, has held that, while a corporation is not bound by engagements made on its behalf by its promoters before its organization, it may, after its organization, make such engagements its own contracts, . . . What is called adoption in such cases is, in legal effect, the making of a contract of the date of the adoption, not as of some former date." Since the contract was adopted, and since it was not made by the corporation until October 16th, and was to last for one year from October 1st, according to the terms of the original agreement, it was to be performed (as far as the corporation was concerned) within the year, and the statute had therefore no application. See also¹

When it is said that the new contract is made with the same terms as the old, it is apparent that if we are dealing with an actual contract, implied from the circumstances of the case and based upon the intention of the parties, the statement must be taken to embody the results reached in the majority of cases and cannot be understood as a conclusion of law, universally applicable. Though the jury might find, in a given case, that the corporation had undertaken *in toto*, according to the terms of the promoter's contract, such a circumstance would be purely accidental.

In the case of *Standard Printing Co. v. Democrat Pub. Co.*,²

¹ *In re Empress Engineering Co.*, 16 Ch. Div. 125 (1880); *Howard v. Patent Ivory Mfg. Co.*, L. R. 38 Ch. Div. 156 (1888); *Northumberland Ave. Hotel Co.*, 33 Ch. Div. 16 (1886); *Battelle v. Cement Co.*, 33 N. W. 327 (Mo. 1887).

² 58 N. W. 238 (Wis. 1894).

suit was brought by the latter for work done in publishing a paper for the former. The contention was as to the sum due. Plaintiff had previously done the work for former owners of the paper at a certain price. These proprietors had formed the defendant company and turned the paper over to it, the plaintiff continuing to do the work. Nothing was said as to the price. Plaintiff claims that the original agreement should be the measure of his recovery. The *Trial Court* found "that the work was done upon an implied promise that the plaintiff should be paid for it such sum as it should be reasonably worth."

Newman, J., held: "This (the original agreement) was but evidence, more or less persuasive, upon the question what was the agreement upon which the work was done for the defendant. And it was a serious question whether the Court ought to infer a promise by the defendant to abide by the previous contract of the promoters however clearly established."

The thought that circumstances may contradict the implication arising in any given case (that the corporation intended to contract according to the terms of the promoter's agreement,) was carried to a considerable length, *In re Northumberland Avenue Hotel Co.*¹ Lopes, J., there said: "No doubt the company, after it came into existence, might have entered into a new contract upon the same terms as the agreement of July 24, 1882, and we are asked to infer such a contract from the conduct and transactions of the company after it came into existence. It seems to me impossible to infer such a contract, for it is clear to my mind that the company never intended to make any new contract, because they firmly believed that the contract of July 24th was in existence and was a binding valid contract."

§ 3. *Formal requisites.*

As in those cases which proceed upon the theory of ratification, so in these dealing with adoption, it is held that only acts within the scope of the corporate powers, and such as are not

¹ 33 Ch. Div. 16 (1896).

against law or public policy, can be adopted;¹ and that the company must have had knowledge of all the facts before it will be bound.²

The question as to who may bind the company by adopting the contract is purely one of agency, to be decided in each case as it arises, and is dependent upon the character of the agreement and the purposes of the corporation.³

CHAPTER VI.

ESTOPPEL.

§ 1. *When applicable.*

Besides the theories which we have been considering, another doctrine, that of estoppel, has at times been employed in order to charge a corporation for work done and services rendered in its formation, or upon a contract made by its promoters.

That the liability of the corporation in such cases depended on estoppel was the thought of the Court in the case of *Grape Sugar & Vinegar Mfg. Co. v. Small*.⁴ That was an assumption brought by Small against the company on account of a balance due for work done and materials furnished to the appellant. It was shown that one Sim, acting as president of the company but before it was duly incorporated, had employed plaintiff to build and repair certain "tubs," the employment having lasted till after incorporation. The defendant asked the Court to charge "that plaintiff is not entitled to recover for the work done and material furnished prior to the day on which the certificate of incorporation was filed for record." This the Court refused to do, and there being a verdict for the plaintiff the company took an appeal.

¹ *Schreyer v. Turner Flouring Mills Co.*, 43 P. 719 (Oregon, 1896); *Munson v. R. R. Co.*, 103 N. Y. 58 (1886); *Burden v. Burden*, 4 N. Y. Supp. 499 (1896); *McArthur v. Times Printing Co.*, 51 N. W. 216 (Minn. 1892).

² *Schreyer v. Mills Co.*, 43 P. 719 (Oregon, 1896); *Weatherford R. R. v. Granger*, 34 S. W. 793 (Texas, 1894); *Huron v. Kittleston*, 57 N. W. 234 (S. Da. 1894); *Rogers v. Land Co.*, 134 N. Y. 197 (1892).

³ *McArthur v. Times Printing Co.*, 51 N. W. 216 (Minn. 1892).

⁴ 40 Md. 395 (1874).

The Court, in affirming the judgment, said: "If, after its incorporation was complete, the company accepted the work done under the contract, it will be estopped, both in law and equity, from denying its liability on account of the same. In other words, the appellant will not be permitted to accept the work done and material furnished by the plaintiff under a contract made prior to the recording of the certificate and, at the same time, deny its liability under it."

In *Weatherford, Etc., R. R. Co. v. Granger*¹ the Court, in referring to the corporation, uses the following language: "Having exercised rights and enjoyed benefits secured to it by the terms of a contract made by its promoters in its behalf, a corporation should be estopped to deny its validity." See, also, to the same effect:²

Now it will be noticed that, in the case of *Grape Co. v. Small*, just cited, the services of the plaintiff had been rendered partly before but partly after complete organization of the company. It had allowed the plaintiff to continue making and repairing its tubs, with full knowledge that he was doing so under the impression that the company would pay him *according to the terms of the contract*, not only for what he was now doing *but for what he had already done*. Under such circumstances the doctrine of estoppel might have a legitimate application.

§ 2. *When inapplicable.*

But it is submitted that the language used in *Weatherford R. R. Co. v. Granger* (and the other cases cited) is too broad, since it would include all cases in which benefits had accrued to a corporation, as well before as after it had come into existence. Now, as to all services rendered or goods bestowed upon a company before it is incorporated it would seem that, if any liability arises, it cannot be based upon the theory of estoppel, for the essential elements of an estoppel are absent.

The elements of an equitable estoppel, by conduct or in

¹ 24 S. W. 795 (Texas, 1894).

² *Joy v. Manion*, 38 Mo. App. 35 (1887); *Low v. R. R.*, 45 N. H. 375 (1864); *Thompson on Corp.*, § 490.

ais, are laid down in Bispham's Equity.¹ It is there said, "Equitable estoppel or estoppel by conduct has its foundation in fraud considered in its most general sense." There must be an intentional inducing of another to act, with a full knowledge of all the facts, and the other must have acted to his detriment.²

It would seem impossible to predicate fraud of a corporation in respect of benefits conferred upon it while in an inchoate condition, and before it had a legal existence.

Again, though the cases suggest that the fraud which estopped the corporation from denying its liability, consists in enjoying the benefits which it knows have been conferred in the expectation that they will be paid for, we have seen that to constitute an estoppel, the one alleging it, must have been induced to act to his disadvantage by the wrong of another, and it would seem to be a strained construction of the doctrine, to hold that a corporation, by merely making use of advantages of which it found itself in possession upon its birth, had induced the conferring of those advantages upon itself.

PART III.

THE BASIS OF CORPORATE LIABILITY FOR PROMOTERS' ACTS.

CHAPTER VII.

WHERE THE BENEFITS HAVE BEEN CONFERRED AFTER INCORPORATION.

§ 1. *General considerations: A true contract possible.*

It is apparent from the foregoing examination of the cases that in theory, at least, the courts have differed widely as to the grounds of corporate liability. It has been alleged on the one hand and controverted on the other that a company comes into existence burdened with liabilities; the doctrines

¹ § 282.

² Bispham's Equity, Chap. IV.

of estoppel and of ratification have been suggested as theories upon which the corporation might be charged for the benefits received; and, finally, it has been generally conceded that the company may assume liability by a process of adoption, though as to the full effect and meaning of "adoption" there is still some doubt.

Whatever the language used, however, it is clear that the courts have recognized the equity existing against a corporation in respect of advantages of which it has been the recipient under a contract made by its promoters. This equity is recognized in spite of the fact that on strict principle the promoter is the only one who can be liable on the original contract, in view of the non-existence of the corporation at the time the contract was made.

Notwithstanding the diversity in the terminology employed, there is a manifest uniformity in the major part of the results reached, which suggests that the underlying principles are the same in most of the cases.

It remains, then, to consider what are the underlying principles referred to, and how far they have been recognized by the courts. For the purposes of this examination all the cases may be divided into three classes:

First. Those in which the promoters have contracted for the corporation in respect of something to be done for it after it shall have been duly incorporated.

Second. Those in which the duties to be performed under the contract commence before, and continue after, incorporation.

Third. Those in which the contract has been fully performed and the corporation has received the benefit before it was legally *in esse*.

In cases of the first class where a corporation has been fully organized and, knowing the terms of a contract made between its promoters and a third party, allows the latter to render the services contracted for under the belief that the company intends to pay him for them, we have all the elements of a real contract; a contract implied in fact. The consensus of opinion of all reasonable men would be that the company must have intended to contract according to the

terms of the former arrangement, and that in view of its conduct it could not be heard to deny that this was its intention. It is in such a case, and in such a case alone, that the doctrine of estoppel would be applicable.

§ 2. *The promoter's contract a continuing offer to the company.*

In these cases we should expect to find the courts acting on the hypothesis of a true contract and endeavoring to enforce an agreement corresponding to the intention of the parties. So it is usually held that a contract made with a promoter constitutes an open or continuing offer to the corporation, which that body may accept upon coming into existence.¹ Having accepted or adopted this offer either expressly or as is more generally the case, by implication, a contract is formed ordinarily of the same terms as the former one and binding upon the corporation.

As was said in *Penn Match Co. v. Hapgood*:² "The power of a corporation to make contracts can be exercised in accepting and adopting proposed contracts made in its name and behalf before incorporation. Such a contract must derive its vitality from the meeting of minds when both parties are in existence; until then it can be nothing more than an offer by one party."

The thought was expressed even more fully in *Weatherford R. R. Co. v. Granger*:³ "Again, where the promoters of a corporation have made a contract in its behalf to be performed after it is organized, it may be deemed a continuing offer on the part of the other party to the agreement, unless withdrawn by him, and may be accepted and adopted by the corporation after such organization; and the exercise of any right, inconsistent with the non-existence of such contract, ought to be deemed conclusive evidence of such adoption."

This fiction of the continuing offer would seem to be justifiable as an aid in giving effect to the intention of the parties.

¹ *Pratt v. Oshkosh Co.*, 62 N. W. 84 (Wis. 1893).

² 141 Mass. 145 (1886).

³ 24 S. W. 795 (Texas, 1894).

That in these cases we are dealing with true contracts seems to be thoroughly established. In *Howard v. Patent Ivory Mfg. Co.*,¹ the company, being duly organized, received the transfer of a leasehold under an agreement made before its existence by its promoters. It knew the terms of the agreement and had passed a resolution undertaking to carry them out. It was argued that, according to an earlier case,² the terms of the original contract were not binding upon the company, though it might be liable to pay a reasonable sum for the use of the property.

Kay, J., said: "In the first place I must observe that the question whether there was a contract between this company and Mr. Jordan is a question not of law but of fact. Am I bound, because in one case the Court upon evidence before it came to the conclusion as a matter of fact that there was no binding contract, to hold that in this case there was no such contract?" and judgment was rendered for the plaintiff.

In *Oakes v. Catharagus Water Co.*,³ the promoters contracted with Oakes that the company should pay him \$1000 if he should render certain services. After incorporation the president, who was one of those who made the original agreement, requested Oakes to perform the services. Having done so, the company refused to pay the \$1000. The lower Court non-suited plaintiff when he sued for the contract price.

The Court, after suggesting that the parties could make a contract on the same terms as the original one if they were so minded, said: "Whether this was the intention and purpose of the president and of the defendant, and of the plaintiff, was under the circumstances of the case a question of fact which should have been submitted to the jury. Ratification or adoption, which in this case mean the same thing, is legally a question of intention to be determined from facts and circumstances as one of fact, and the Court was not warranted under

¹ L. R. 38 Ch. Div. 156 (1888).

² In re Northumberland Avenue Hotel Co., 33 Ch. Div. 16 (1886).

³ 143 N. Y. App. 430.

the circumstances in disposing of the question as one of law." Judgment was, therefore, reversed. See also¹

Since we are dealing with an obligation founded upon the intention of the parties, certain elements must be present before a jury would be warranted in finding that the undertaking had been entered into by the corporation. First of these is knowledge of the facts and circumstances attending the rendering of the services. This we have seen to be a prerequisite, while discussing the theories separately, and the same reason applies wherever there is a contract implied in fact, for it is impossible to say that one has either ratified or adopted a contract or accepted an offer, when he had knowledge neither of the one nor the other.²

If a case should arise in which benefits were conferred upon a corporation after due organization without its knowledge under a contract made prior to its formation, it would seem that on theory the only ground of recovery would be in quasi-contract. The point, however, has not so far arisen.

§ 3. *What constitutes corporate knowledge.*

It will be necessary in this connection to investigate briefly what is considered the knowledge of the corporation. In *Davis Wheel Co. v. Davis Wagon Co.*,³ it was said: "The authorities do not agree whether a corporation is to be held cognizant of facts which have come to the knowledge of an officer or director unofficially; but the better opinion would seem to be that if the officer or director is an active agent of the corporation in the transaction affected by his knowledge, it is not material how or when he acquired his information."

Taking the opinion here expressed to be the better one, it

¹ *Rogers v. Land Co.*, 134 N. Y. 197 (1892); *Penn Match Co. v. Hapgood*, 141 Mass. 145 (1886); *Pratt v. Oshkosh Match Co.*, 62 N. W. 84 (Wis. 1895); *Standard Printing Co. v. Democrat Pub. Co.*, 58 N. W. 238 (Wis. 1894); *Spiller v. Paris Skating Rink Co.*, 7 Ch. Div. 368 (1878); *Northumberland Avenue Hotel Co.*, 33 Ch. Div. 16. (1886).

² *Schreyer v. Mills Co.*, 45 F. 719 (Oregon, 1896); *Weatherford R. R. v. Granger*, 34 S. W. 793 (Texas, 1894); *Huron Co. v. Kittleson*, 57 N. W. 234 (S. Da. 1894); *Rogers v. Land Co.*, 134 N. Y. 197 (1892).

³ 20 Fed. Rep. 699 (1884).

is well settled that notice of facts to individual stockholders or corporators is not notice to the corporation¹ of those facts. The same rule pertains as to a director.² Notice to an agent, however, whose duty it is to disclose his knowledge is notice to the company.³ The knowledge of the officers of a company is its knowledge.⁴

So, in *Rogers v. Land Co.*,⁵ the corporation had been formed by joint holders of land under an agreement among themselves, that the company should serve a certain purpose, the owners becoming officers and directors. The Court, in enforcing the agreement, said: "The corporation was charged by the knowledge of its directors, the source of its title, and the consideration paid for the land, with notice of the proceedings of the bondholders which led to its existence, as well as their object in causing it to be organized."

§ 4. *Where the promoter's contract would have been ultra vires or illegal if made by the corporation, the company not bound.*

It is also generally said that only acts within the scope of the corporate powers and such as are not against law or public policy can be adopted.⁶ In view of the fact that the basis of the obligation created by this so-called adoption is, as we have seen, an implied contract, this statement must be taken to mean, not that the jury would be unjustified in finding that the corporation had intended to make an *ultra vires* or illegal contract, but that the effect of such intention was a nullity, and that the purpose of the company, however clearly expressed by words or actions, was inoperative to create a valid contractual relation. The same thought is apparent in the cases employing the doc-

¹ *Housatonic Bank v. Martin*, 1 Met. (Mass.) 294 (1840).

² *Custer v. Tompkins Co. Bank*, 27 P. S. 132; *Weatherford R. R. Co. v. Granger*, 24 S. W. 795 (Texas, 1894).

³ *Burt v. Batavia Paper Co.*, 86 Ill. 66 (1877).

⁴ *McDermot v. Harrison*, 9 N. Y. Supp. 184 (1890); *Bommer v. Spiral Hinge Co.*, 81 N. Y. 469 (1880).

⁵ 134 N. Y. 197 (1892).

⁶ *Munson v. R. R.*, 103 N. Y. 53 (1886); *McArthur v. Times Printing Co.*, 51 N. W. 216 (Minn. 1892); *Schreyer v. Turner Mills Co.*, 43 P. 719 (Oregon, 1896); *Burden v. Burden*, 4 N. Y. Supp. 499 (1896).

trine of ratification, and was noticed under that head.¹ Again, wherever a formal action by the board of directors, or other corporate officers, is required by statute or the corporate charter, in order to bind the company if it were acting in the first instance, a like formality must have taken place before the company is bound.² The whole question belongs rather to the law of *ultra vires* acts of corporations than to that of contracts.

Malcolm Lloyd, Jr.

¹ See ante.

² *McArthur v. Times Printing Co.*, 51 N. W. 216 (Minn. 1892); *Schreyer v. Turner Mills Co.*, 43 P. 719 (Oregon, 1896).

THE ADMINISTRATION OF JUSTICE IN JAPAN.

The material for a complete comparison of the commercial rules is not yet available; but in the Introduction to *the "Materials for the Study of Private Law,"* is contained certain information which enables us to form an opinion on some of the essential points to be compared.

Among the various agencies of modern commerce (other than those resting on mechanical invention) perhaps the institutions of prime and elemental consequence may be said to be the bank, the exchange, the insurance system, the brokerage contract, and the joint-stock corporation. Of the documentary expedients for facilitating commerce and utilizing credit, the leading and indispensable types are the bill of exchange, the cheque, and the bill of lading. On these things the commerce of to-day is built up, and from them flow the majority of the relations which modern commercial law busies itself in adjusting. Now, the pages of the volume before us demonstrate clearly that, for over two hundred years, Japan has possessed every one of these types of documents, and has thus been familiar, during all that period, with the typical and ordinary transactions which form the material for modern commercial law. We shall not attempt to argue that Japan anticipated the Western nations in the development of these ideas; though this is easily demonstrable, for many of the above instrumentalities, as to all others than the great commercial communities of early modern times. It is enough to call to mind that these ideas are with us of a comparatively recent origin, and to point out that, for more than two centuries, Japan has made use of institutions and expedients which have been known for the same length of time in but few districts of Europe.

The guild of the bankers was organized in Osaka about 1660, the only European districts having, at that time, a real banking system being the commercial towns of Italy. These banks in Japan lacked none of the essential features of our own. They received on deposit, honored cheques, issued

notes, negotiated bills of exchange, discounted bills drawn against merchandise, and acted in general as the intermediaries for commercial transactions. The smaller banks were connected financially with the larger ones, just as the country banks are with those of American cities and the provincial banks with those of London. They supported each other in times of financial embarrassment, performing substantially the functions of banks of to-day. They had some sort of a clearing-house system, the details of which are not yet clear. In short, there is little in the Western idea of a bank which the Japanese institution did not have or could not easily have assimilated.

Exchanges were the successors, alike in Japan and in Europe, of markets and fairs. The Osaka Rice Exchange at Dojima dated back to half a century after the Royal Exchange in London. There were money exchanges also, at which quotations were obtainable for gold, silver, and small money. At the Rice Exchange were brought and sold the rice certificates issued by the storehouse-keepers of the great *Daimyo*, as well as the rice-products shipped to Osaka and Yedo by the farmers themselves. Dealing in futures was one of the elementary notions on 'Change in Japan, and the Government seems to have made efforts, equally strenuous and only a little less futile than those in the West, to stop gambling in staple agricultural products. The sales in the Exchange were conducted very much as they are now; and when the bidding was opened, there was, according to the chronicles, the same madness of behavior and vociferous competition among the brokers of two hundred years ago which characterize this scene in every Exchange to-day. Of options and the like varieties of Exchange transactions, nothing specific is reported in these volumes. But enough is given to show that the methods of the Exchanges were highly developed, and that closer investigation would probably reveal all of the varieties of transactions which we know to-day, or varieties equally complex and technical.

Of insurance no details are as yet furnished us,—only enough to indicate that for the bulk of the sea traffic between

Osaka and Yedo a system of mutual insurance was in operation (under the management of the guilds) for two hundred years. Of the mercantile joint-stock corporation it is not possible, certainly, to say that it existed. Further investigation may show that commercial houses like the Echigo House—where the name was borne by a family of five or six branches having a common stock and a single profit-and-loss account—were managed on the principle of the joint-stock company. Whether this was so or not is here less to our purpose; for the present popularity of the joint-stock company in Japan and the vast area of business now managed by this form of organization puts beyond any question the applicability of the new Codes to Japanese conditions. It is, however, worth pointing out that Japan is in some respects better fitted to comprehend and to apply with facility the modern corporate idea than the countries owning the sway of English law. It has taken nearly a century for the English and American bar and bench to work out the true theory of a business partnership,—the notion of the business is an entity, a legal person, quite distinct in its standing from the individuals who make it up. The true result has come, partly through Germany, but chiefly by self-discovery. Now, in Japan, the notion of a business as an entity requires no effort to appreciate and apply. In the idea of a family and of a family business as an entity it has long been familiar to them. The unity, the unbroken continuity, of a family-business corresponds closely to the modern notion of a partnership, and offers a congenial field for its application in law.

When we come to the cheque, the bill of exchange, and the bill of lading, we find Japan threatening to dispute even with Italy for priority of invention. The cheque cannot be proved to have existed in the commercial transactions of Europe, outside of Italy, until the late seventeenth or early eighteenth century,—in England, indeed, not until about 1760, and in France and other Continental nations not till 1765. In Japan we find the bankers employing cheques (*furi-dashi-to-gate*) as early as, say, 1650. The volume before us describes some of the practices with reference to them. One would, perhaps,

not expect to hear of "certified cheques" in Japan in these banks of the old régime; but there they were. The indorsement was as necessary in this cheque as in our own. The dishonored cheque was equally worthless as a payment of a debt. Perhaps the most startling parallel of all is the rule that a bank which receives from another bank a cheque drawn against no funds, or otherwise faulty, must return it to the latter bank before twelve o'clock in order to recover payment.

For the bill of exchange there are even older traditions. In Europe, if we forget the commerce of the classic ages, and go back only along the lines of modern commerce, we find the bill of exchange introduced, nobody knows exactly where, or exactly by whom, but certainly used and developed by the Italians of the twelfth century and later. In Japan there is a law of the next century, in which such documents (*kaye-sen*) are regulated; and in later times there are plentiful references to them. The later name (*kawase-legata*) covered a number of varieties brought into existence by the complexities of commerce. We need not here cite proofs in detail. It is sufficient to say that the principle was perfectly understood, and that it was applied in essentially the same transactions as at present. Most worthy of note is the fact that it served effectively to adjust the equilibrium of trade between Osaka and Yedo. The great *Daimyo* of the West in Yedo sold their rice in Osaka; but they and the people of Yedo relied on Osaka for most of the staple manufactures. Thus Osaka owed Yedo *Daimyo* for rice; Yedo wholesalers owed Osaka exporters for manufactures; and by bills of exchange an immense volume of exchange was settled at the least expense. This is only one indication, but a most important one, of the comprehension shown in Old Japanese commerce of the functions of the bill of exchange.

The bill of lading was not quite the same in form as ours; it purported to be an order by the shipper to the captain to deliver, or a notice to the consignee of the shipment, not a receipt by the company or captain, and the list of the goods was written into it, not contained in a separate invoice. A copy of the bill of lading, it seems, was, where feasible, de-patched

by land route to the consignee; but usually the bill was packed in with the goods. It was sometimes made out in blank, or, at least, in the alternative; whether it circulated as representing the goods does not appear. The art of slicing down the vessel's responsibility to the smallest possible contingency was apparently unknown; but it has not taken long for Japanese shipping companies to learn the value of these limiting clauses. The rules of the guild, however, provided for the ordinary contingencies, and questions of average and freight were settled by the guild rules.

Such were the facts of Japanese commerce. It is idle to contend that Japanese mercantile life of the last generation was equal in richness of development, complexity of operation, fertility of resource, or importance of undertakings to the Western mercantile life of to-day, or even of the last generation. But we do not have to go very far back to reach a point where the comparison is not so unequal a one, and what we do find throughout is that Japanese commerce possessed, with scarcely an exception, the fundamental mercantile institutions and expedients with which Western commercial law deals. Europe and America have for nearly two hundred years had advantages which have been denied to Japan; notably they have had the opportunity for a free exchange of the new ideas which each day brings forth, an opportunity through the lack of which Japan has suffered in almost every department of commerce, whatever it may have gained in art. But meanwhile Japan has been in the possession of these fundamental commercial notions, and, like the steward who turned his one talent into five, this country has preserved and developed these ideas to as high a degree as was possible under the circumstances. Greater opportunities for assimilation and enlargement now lie before it; and it is idle to suppose that they will not be amply utilized.

We have devoted some space to elucidating these topics, because we think they illustrate the whole issue of Japan's fitness for the new laws. The question is whether we are pouring new wine into old and worn-out bottles or into bottles reasonably fit to receive it. Are the fundamental legal ideas

of the Japanese people alien or kindred to the continental principles taken as models?

What seems now clear is that our attitude towards Japan is without support, when we assume that the new Code brings in notions and rules novel to the people or opposed to their traditions of commerce. Foreign art (to employ comparison), indeed, has offered to the Japanese new tools, new standards, new canons. Western education is in principle thoroughly different from the received Chinese system. The railway and the steamship were never before known there. In these cases we may assert with truth that the Western importation either is an entire novelty or is radically different from what existed before. But just as Japanese paper is turned out no less skilfully, merely because the processes may now be carried on by steam-power instead of by hand, so we have no cause to anticipate friction from putting into force a modern commercial Code in a nation which has for two centuries possessed nearly every leading institution and expedient therein regulated. It is simply giving to Japan the advantage of the more developed form of these ideas to which the West, by the favor of circumstances, has been enabled to bring them.

IV. THE FUTURE OF EXTRA-TERRITORIAL JURISDICTION.

An acute observer of French institutions, analyzing the tendency to revolutions which has characterized that nation, explains it as the consequence of a powerful rationalizing tendency, a capacity for perceiving that which is theoretically right and for trying to make it square with the facts, no matter at what practical cost to the country. This is just the opposite of the Anglo-Saxon idea. For a hundred years England tolerated electoral corruption, until it became unbearable. For nearly a century the United States were satisfied to put aside the problem of slavery, until events forced them to cut the knot with violence. In international affairs the Anglo-Saxon spirit is the guide of nations. A *modus-vivendi*,—this is all that is desired. Theoretical incongruities and possible mischances may be disregarded, if only to-day's life be fairly well regulated. Now, this is the condition of Extra-terri-

toriality as an international institution. It is but a makeshift. It is liable at any moment to fail to run smoothly. It is only now and then that we are stirred up to reflect on the makeshift character of the whole institution and the practical difficulties into which it is liable at any moment to plunge us.

As an instance of the complex and unworkable character of the principle of extra-territoriality, we make take some of the incidents of the latest trial of consequence (except the Ravenna-Chishima Case of 1893) in Yokohama.

Take, first, the holding of a coroner's inquest, by a British coroner over a British subject killed by an American citizen. A coroner, as Blackstone defines him, "is ordained . . . to keep the peace . . . If any be found guilty by his inquest, of murder or other homicide, he is to commit them to prison for farther trial . . . and must certify to the Court of the King's Bench or the next assizes."

Clearly, as Mr. Piggott puts it in his volume on "Extra-territoriality," "the duties of the coroner of inquiring into all cases of sudden death . . . form an integral part of the administration of the criminal law." The inquest in Japan is part, then, of the machinery which serves to discover and punish those over whom the (in this case) British Consular Courts have jurisdiction. But if a British subject is killed by a United States citizen, the British Consular Court has no jurisdiction. How, then, can it be right to set that machinery in motion, since it is clear that in the end it must be to no purpose? Doubtless, it will be said that in the beginning the cause of death is assumed to be unknown, and that proceedings must be begun as of course. Yet this argument, perhaps, requires that when it appears that the cause of death was a person over whom British courts have no control, the proceedings should thereupon be terminated with a verdict to that effect. Mr. Piggott believes that "presumably the inquisition may charge the offence against either a native or a foreigner [of another nation]." But there is another passage in Mr. Piggott's book which seems to contradict this conclusion. "The peculiar nature," he says, at p. 94, "of this jurisdiction [of each treaty power over its own subjects] must

not be lost sight of. In no sense does the foreign sovereign act as a protector of the rights of his subjects, he merely enforces their duties.' May it not, then, be argued that the moment a foreign Inquest assumes to declare a verdict of, say, wilful murder against the subject of another foreign Power, the coroner and his men cease to perform the function of enforcing the duties of their nationals, and undertake that of protecting their rights, this latter according to Mr. Piggott, a function which they do not possess? It is not intended to express a final opinion on the subject; but merely to indicate that there is something to be said for both views, and that it is fortunate that the doctrine of extra-territorial jurisdiction has not yet been strained at all its weak points.

Perhaps the weakest feature of it is the obstructions which it places in the way of adequate judicial investigations. In the summoning of witnesses and the extraction of testimony, extra-territoriality leaves justice bound as with ropes and helpless to attain its ends. In cases like the one just stated, the greatest opportunities exist for obstruction and error. It was without the power of the American Consular Court to enforce the attendance of any witnesses not citizens of the United States. It is true that by the Orders in Council, the judge of the British Consular Court is empowered to order the examination of British witnesses on application of a foreign court. But it is obvious that the ordering of such an examination is within the discretion of the British judge, and cannot be compelled by the foreign court. Apart from this act, a foreign court is powerless either to compel the attendance of witnesses who are subjects of other nations or to prevent them from refusing to answer whenever the question is not to their liking. The only method of compulsion in such cases is a commitment for contempt, and this power is given to a foreign court only over its own nationals. In such a case it is quite within the bounds of possibility that the non-compellable witnesses may stand by and see an accused person suffer wrongly or a crime go unproved, if it suits their interests to do so; or they may bargain with the accused's representative and agree to go on the stand on condition of being asked

certain classes of questions only. We do not believe ~~it~~ likely that national prejudice will ever lead to such dire results, but experience teaches that we must be prepared for the unlikely. In the judgment in the Hetherington Case in Yokohama, in 1892, it was suggested that those who suppressed evidence in this way were to be regarded as accessories to crime. But whatever their position might be morally, it is clear ~~that they~~ are legally guilty of no offence, since the law of the trial court extends only to its own nationals, and the refractory ~~absentees~~ are held to no sort of responsibility to that court, if ~~it is done~~ to any.

And if such persons do consent to go upon the stand, ~~what~~ ^{what} security is there for their testimony? Certainly there ~~is~~ ^{is for} them no danger of the pains and penalties of perjury. The ~~minibus~~ ^{The} of extra-territoriality is ever with them, and ~~their~~ ^{their} criminal responsibility for false testimony exists only when they are standing in the court of their own nation. It is difficult to see how false testimony given by Japanese or Italian subjects in a United States Consular Court could be the cause of an hour's detention of those witnesses, richly as they might deserve it. This is one of the features of extra-territoriality, that wrong-doing is licensed to flourish unchecked. It is only to be wondered that opportunity does not oftener occur to demonstrate this practically. Analogous to difficulties of this sort is the obstruction to the procurement of material evidence. The card and the pistol, for example, which figured in the Hetherington trial, passed through the hands of at least one set of officials who were not bound to produce them in the Consular Court when the time came; and if the case had been a little different, the number might have been greater. Where faithful and impartial officers are concerned, no miscarriage can arise. But it is apparent that there would here be ample opportunity for conduct which would seriously obstruct the course of justice. Illustrations have been taken from the Hetherington Case of 1892. But the moral applies to the whole mass of controversies arising in our Treaty Ports. It is a matter which affects all the Treaty Powers alike. Perhaps it adds especial complications to American jurispru-

dence, because it involves questions of constitutional guarantees; but on the whole this is no more serious a tangle than that to which the British Statute-book and British Colonial administration are liable. There can hardly be two opinions as to the makeshift character of the whole institution. We can only hope that it will have passed away from Japan before any event occurs to strain it to the breaking point and involve us in inextricable consequences.

The question naturally arises, Why should we not agree to the abolition of extra-territorial jurisdiction in Japan? What circumstances should restrain us from acceding to the demands for abolition which Japan formally made by its Commissioner, at Berne, in September, 1892, at the Session of the Institute of International Law?

The practical ground for the establishment and maintenance of the system of extra-territorial jurisdiction was concisely expressed by Secretary Fish, in 1871, when he wrote to Minister De Song: "All that has been sought by the Christian Powers is to withdraw their subjects from the operation of such laws as conflict with our ideas of civilization and humanity, and to keep the power of trying and punishing in the hands of their own representatives." This is the whole basis of extra-territorial jurisdiction in Japan. The diplomatic documents of the times, in which the epithets "semi-barbarous," "semi-enlightened," "despotism," and the like, are freely used, indicate clearly the nature of the dominant conception. Epithets such as these never had any foundation in fact. The right of Japanese culture to receive in the fullest degree the title of a civilization is still to a certain class of people an impassable *pons asinorum*, but it is open to a demonstration as easy and as various as is the Pythagorean proposition. All that could serve, forty years ago, as the basis of a claim of extra-territorial jurisdiction, was the undoubted presence of a feudal framework in the government of the country. Even this never seemed a sufficient basis to Townsend Harris, the negotiator of the treaty. He declared that the claim was "against his conscience;" and the then Secretary of State (Marcy) regarded it as an unjust interference with the municipal laws of a country. But this frame-

work of feudalism disappeared many years ago. Japan had long since outgrown it; and it fell away, amid the cannon-smoke of 1868, like a rotten scaffold which has been left about a completed mansion and finally falls at a tremor of the earth. With it disappeared the outward disfiguring incidents of a feudal state of society. It may be safely said that there is little more left of feudalism to-day in Japan than there is in Germany. As for the inner substance—the degree of refinement to which the art of living has been carried, the private and public virtues of the people—it is inexcusably invidious for us to assume to judge them in any other spirit than that in which we would criticise Italy, France, or any other political equal of Europe. Let anyone come to Japan in the spirit of a learner, and he will find that it has lessons of life even for self-contained America.

The exasperating thought to the sensitive Japanese (and that is every Japanese, when the national honor is touched) is that, while the bonds of extritoriality are fast about his country, other nations whose irregular and irresponsible justice constantly calls for diplomatic intervention, are endowed by an accident of birth (so to speak), with an autonomy which some of these very offenders join in denying to Japan. When the Japanese subject glances over our diplomatic history and reads the incidents of the *Virginus* in Cuba, of Van Bokkelen in Hayti, of Wheelock in Venezuela (to name no others), and realizes that every one of these States is as much beyond his own international rights as it is behind in much that makes for civilization, it is no wonder that he regards Treaty Revision as first and foremost a question of redeeming the national honor. He need not claim that justice is administered in his country in any manner that could be compared to that of any nation of the earth. Certainly, he could not say that the British or American resident could find everything here that he would meet in his own courts. There are certain features of his justice which an Anglo-Saxon cannot expect to find anywhere duplicated. *Quot homines, tot sententiae*, and the rule applies to nations also. But the writer is free to say (knowing something of Japanese courts and not very much of European) that

he would as willingly be tried in a Japanese court as in that of any Continental nation—and more willingly in some respects.

To give an instance, the penalties (especially the fines) of the Japanese Criminal Code are considerably lighter, strange as it may seem to some, than in our own country. This was recently well illustrated by the action of the British representative in Japan, when he gave assent to the new Game Regulations and promulgated a British draft; for the penalties of the Japanese ordinance reached a maximum of from twenty to fifty dollars (Mexican), while those of the British Order reached from fifty to one hundred, with the added alternative of a term of imprisonment. In general practice, too, the Japanese courts seem to run to much lighter terms of imprisonment. Again, the foreigner is everywhere here treated with much more consideration than in continental Europe—for reasons which cannot here be explained; and a foreigner may count on more courtesy in a Japanese tribunal than the average commoner could look for on the Continent.

After all, what is it that goes to make a proper administration of justice? Is it good laws? Then most emphatically there is justice here; for Japan has laws equal to the best in Europe. They are the product of a concert between the best foreign and native experts, and have been two decades in preparing. Is it competent judicial officials? There are now some 1250 in all, nearly half of them trained in Western law; organized into courts on a most approved plan; stationed in every province and county of the Empire; and comparing more than favorably with English and French courts in the despatch of business. Many of them lack experience, but that is a defect which time is every day curing, and is certainly not to be emphasized. Is it that the nation must have certain fundamental notions of law and justice? Then it can be demonstrated that Japan is one of the most law-abiding nations in the world; that it possesses a legal and judicial history dating back, at least, to the days of Charlemagne; that such institutions as banks and exchanges, with their accompaniments of cheques, bank-notes, bills of exchange, and "futures," have been familiar for two hundred years in Japan;

that the judiciary of the last two centuries developed their precedents in a manner differing little in spirit from that of the judges of England; and that a system of procedure and of substantive rights was then worked out, containing in essence all the titles of European law, and corresponding in general trend to Continental rules. Mr. Blaine, in 1881, in language which there could have been no evidence to justify, predicated of this people "an utter incompatibility of habits of thought on all legal and moral questions," which, with other things, "made it impossible to trust the persons, the property, and the lives of our own people to such a jurisdiction." Of this it can only be said that a more cruel libel was never penned in our diplomatic history. So gross a misconception can be compared only to some of the ignorant notions of the United States that lodged in many British heads for decades after the Revolution. But time has brought its revenges. "All that has been sought," said Mr. Fish, in the passage above quoted, "is to withdraw their subjects from the operation of such laws as conflict with our ideas of justice and humanity." Yet one year ago, twenty-one years after this sentence was penned, an accused murderer, Carstens, arraigned in a Yokohama tribunal, demanded that he should be tried in a Japanese court, not in the German Consular Court, disclaiming his German nationality for the specific reason that he could hope under the Japanese Code, but not under the German, for a certain diminution of penalty on the ground of extenuating circumstances. Thus, in 1892, we are presented with the spectacle of a subject of a leading Western Power "seeking to withdraw" himself "from the operation of a law" of his own State because the corresponding law of Japan is less "in conflict with his ideas of justice and humanity."

It is time that we recognized for Japan the validity of the honorable principle enunciated by Secretary Marcy nearly forty years ago, during a diplomatic incident with Austria: "The system of proceedings in criminal cases in the Austrian Government has undoubtedly, as is the case in most other absolute countries, many harsh features, and is deficient in many safeguards which our laws provide for the security of

the accused. But it is not within the competence of one independent Power to reform the jurisprudence of others, nor has it the right to regard as an injury the application of the judicial system and established modes of proceeding in foreign countries to its citizens when fairly brought under their operation. All we can ask of Austria . . . is that she should give American citizens the full and fair benefit of her system, such as it is. . . . She cannot be asked to modify her mode of proceedings to suit our views, or to extend to our citizens all the advantages which her subjects would have under our better and more humane system of criminal jurisprudence."

If this is good law for Austria, it is even better law for Japan; for the legal system of Japan to-day is probably much better than was that of Austria forty years ago. On the principle here set forth, Japan can surely claim that the long-standing indictment against her be quashed without delay, and that her judicial autonomy be once more restored as nothing less than justice.

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PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

The Court of Appeal of England has recently decided, that a solicitor employed by a client in regard to his claim against a third person has no implied authority, before action is brought, to effect a compromise of the claim, there being no difference between the case of a solicitor who appears for a party in an action, and one who acts for a person where no action is as yet in existence: *Macaulay v. Polley*, [1897] 2 Q. B. 122.

Attorney
and Client,
Compromise
of Right of
Action

The Supreme Court of Michigan has lately held, that under the statute of that state, (How. Ann. Stat. Mich. § 3582.) which gives turnpike companies a right to collect tolls from persons traveling on their roads in vehicles drawn by animals, a turnpike company has no right to charge for the use of its road, by persons using bicycles: *Murfin v. Detroit & E. Plank Road Co.*, 71 N. W. Rep. 1108.

Bicycles,
Toll Roads

This case follows *Williams v. Ellis*, 5 Q. B. D. 175, 1880, and rejects *Geiger v. Turnpike Road*, 107 Pa. 583, 1895, where the Supreme Court of Pennsylvania prescribed that a bicycle should be charged toll, "according to the number of wheels and horses drawing the same."

An ordinance requiring every person who uses a bicycle to ring an alarm bell upon approaching any and all crossings or cross walks, enacted in pursuance of statutory authority to regulate the riding of bicycles, is not, as a matter of law, unreasonable: *City of Emporia v. Wagner*, (Court of Appeals of Kansas, Southern Department, C. D.,) 49 Pac. Rep. 701.

Warning of
Approach

In *Nanman v. Weidman*, 37 Atl. Rep. 863, the Supreme Court of Pennsylvania recently ruled that a devise of land to a religious association in trust to devote the income to keeping the testator's family lot in the meeting house graveyard in order, and to distribute the balance in amounts specifically limited, to home or foreign missions, and the residue among the needy poor of the vicinity, as the trustees and their successors might think best, created a valid trust for charitable uses, and not a perpetuity.

Charities,
Devise for
Charitable
Use,
Burial Lot,
Missions

Common Schools. Use of School House School directors may not permit the use of school buildings for sectarian religious meetings, nor for the holding of public lyceums, nor for any purposes other than those recognized as school purposes: *Bruder v. Streabich*, (Supreme Court of Pennsylvania,) 37 Atl. Rep. 853.

Constitutional Amendment. Adoption A constitutional amendment may become a law, though the legislature made no joint resolution formally declaring that it should be submitted to the people, and though it was not printed upon each ticket upon the ballots voted in the general election: *State v. Herried*, (Supreme Court of South Dakota,) 72 N. W. Rep. 93.

Constitutional Law. Appointment of Officers The Supreme Court of Minnesota has declared unconstitutional an act (Gen. Stat. Minn. 1894, § 7926,) which requires the governor to appoint members of the state board of pharmacy from among a certain number of pharmacists elected by the state pharmaceutical association, on the ground that it creates an unauthorized limitation upon the appointing power: *State v. Griffin*, 72 N. W. Rep. 117.

Administration. Estate of Supposed Decedent The Supreme Court of Rhode Island has lately decided that the statute of that state, (Pub. Laws R. I. 1882-5, c. 298,) which provides for the administration of the estate of one who has been absent and "not heard from, directly or indirectly, for the term of seven years," as if he were dead, violates Art. I., § 10, of the state constitution, and the Fourteenth Amendment to the Constitution of the United States, providing that no person shall be deprived of property without due process of law: *Carr v. Brown*, 38 Atl. Rep. 9.

Contesting Tax Sales The Supreme Judicial Court of Maine has recently held unconstitutional the statute of 1895, c. 70, § 11, amending Rev. Stat. Me. c. 6, § 205, which required the owner of land sold for non-payment of taxes to deposit with the clerk of court the amount of all taxes, interests and costs accrued up to that time, before he should be permitted to contest the validity of the tax or sale, on the ground that it infringed upon the constitutional rights of the citizen not to be deprived of his property, but by the judgment of his peers, or by the law of the land, to have remedy by due course of law for any injury done to his property, and to have right and justice administered to him freely and without sale: *Bennett v. Davis*, 37 Atl. Rep. 864.

A state may lawfully compel its counties and cities to indemnify against losses of property arising from mobs and riots within their limits, independently of any misconduct or negligence on the part of such city or county to which the loss can be attributed; and a statute imposing such liability is therefore constitutional: *Penna. Co. v. Chicago*, (Circuit Court, N. D. Illinois,) 81 Fed. Rep. 317.

The Court of Appeals of Kentucky, in *Schmitt v. Mitchell*, 41 S. W. Rep. 929, has recently had occasion to pass upon a number of questions in regard to voting at corporation elections.

Corporations, Elections, Voting, Executors It holds (1) That the stock of a decedent belongs to and may be voted by his personal representatives, until there has been a settlement and division of his estate; that one of several executors may vote stock belonging to the estate, in the absence of his co-executors, and that a proxy given by one of the absent executors is revoked by the vote of the one who is present; and that the provision in such a proxy that it shall remain in force until revoked by the grantor in a certain way does not prevent its revocation by the co-executor; (2) That under the constitutional provision for cumulative voting, (Const. Ky. § 207,) it is no objection to the validity of an election that the stockholders did not vote cumulatively, when it

Cumulative Voting does not appear that any of them claimed the right to do so; (3) That one who holds stock as executor may be elected a director of a corporation; (4) That the fact that a full board of directors is not elected at an election because one of the candidates is ineligible, does not authorize the old board to hold over; those who are duly elected constitute the board and have power to fill the vacancy; and (5) That notice to stockholders of the fact that one for whom they vote as a director is not a stockholder does not authorize the ignoring of their votes, so as to give the election to a candidate who has a minority of the votes cast, unless it clearly appears that they knew that that fact amounted to a disqualification.

Promoters, Compensation from Vendor A vendor's promise to compensate the officers of a private corporation for services in its promotion and organization, and for procuring the sale of his land to it, which has not been rescinded, is not necessarily illegal by reason of the antagonistic relations involved and the special opportunities afforded for fraud, no actual fraud

having been disclosed: *Dexter v. McClellan*, (Supreme Court of Alabama,) 22 So. Rep. 461.

The sale of the entire property of a corporation will not be enjoined at the instance of a single stockholder, in the absence of unfairness, fraud, or, oppression, when the sale was authorized by a vote of more than eleven hundred out of one thousand three hundred and fifty shares: *Peabody v. Westerly Waterworks*, (Supreme Court of Rhode Island,) 37 Atl. Rep. 807.

An action for money had and received will not lie at the suit of a corporation to recover a sum received by a former director as a bribe for resigning his office and procuring the delivery of the control of the corporation to the briber for fraudulent purposes; the only remedy of the corporation in such a case is an action to recover damages for the fraud practiced upon it by the directors: *McClure v. Law*, Supreme Court Appellate Division First Department, 46 N. Y. Suppl. 775; *McClure v. Trask*, 46 N. Y. Suppl. 780.

When a stock broker has converted securities belonging to his customers, by pledging them to third parties, the fact that the customers receive from the pledgees whatever proceeds of the securities remain after satisfying the pledge does not constitute such an election of remedies as to debar them from pursuing the broker for the rest of their loss: *In re Pierson's Estate*, (Supreme Court of New York, Appellate Division, Third Department,) 46 N. Y. Suppl. 557.

The Supreme Court of Missouri has lately decided, that under the election law of that state, April 18, 1893, (Laws 1893, p. 164,) which provides that "any elector who declares under oath to the judges of election having charge of the ballots that he cannot read or write, or that by reason of physical disability he is unable to mark his ballot, may declare his choice of candidates to the judges, having charge of the ballots, who, in the presence of the elector, shall prepare the ballot for voting. . . . Provided, however, that the provisions of this section shall not be construed to allow any judge or judges of any election to enter a booth for the purpose of assisting any elector in preparing his ballot. Such judges, after reading to the elector the contents of the ballot shall without leaving their respective positions prepare such ballot as the elector may dictate," a ballot is not vitiated by the fact that the judges assisted in preparing it without the preliminary oath

required by statute, or by the fact that they went into a booth, in violation of the statute, to assist in preparing the ballot : *Hope v. Fleutge*, 41 S. W. Rep. 1002.

Barclay, C. J., and Macfarlane and Robinson, JJ., dissented.

When a cross outside the circle in a ballot appears to have been made intentionally with a pencil, while a cross within the circle was made with the official stamp, it is to be presumed that the cross outside the circle was made as an identifying mark, and the ballot should not be counted; but when an imperfect cross is made at the right of the name of a certain candidate, and may have been made for the purpose of voting for the candidate for the same office on another ticket, without accomplishing that purpose, the ballot should be counted, though the mark was intentionally made; and ballots defaced by ink blots should not be rejected, when the blotting seems to be not intentional, but accidental, and due chiefly to the use of poor paper for the ballots: *Church v. Walker*, (Supreme Court of South Dakota,) 72 N. W. Rep. 101.

Under the election law of New York, (Laws. N. Y. 1896, c. 909,) a ballot on which the cross-mark is placed before the name of a candidate, but not in the "voting space," is not valid, and should not be counted: *People v. Common Council of City of Elmira*, (Supreme Court of New York, Appellate Division, Third Department,) 46 N. Y. Suppl. 701.

The cross-mark on a ballot need not be perfect, but it must be in the proper place; and under Election Law N. Y. § 105, as amended by Laws 1896, c. 909, which provides that the cross-mark shall be made "before" the name of each candidate for whom the voter wishes to vote, a ballot will not be counted for an office if no cross is placed before any name printed thereon for that office, though one is placed after one of the names printed in the space provided for voting for a person whose name may be written in the blank space left for that purpose, no name, however, being written therein: *People v. Mehrer*, (Supreme Court of New York, Appellate Division, Second Department,) 46 N. Y. Suppl. 898.

On the principle that "*Res ipsa loquitur*," the escape of electricity from a street railway, resulting in the fright and injury of a horse being driven on a public street, creates a presumption of negligence in the operation of the railway: *Trenton Pass. Ry. Co. v. Cooper*, (Court of Errors and Appeals of New Jersey,) 37 Atl. Rep. 730.

Electric
Railways,
Escape of
Electricity,
Negligence

The Supreme Court of Rhode Island has lately decided that a bill in which all the complainants seek as taxpayers to enjoin the defendant municipality from purchasing the plant of a waterworks company joined as a defendant, and in which one complainant further seeks as a stockholder of the company to enjoin the sale on the ground of inadequacy of price, is multifarious: *Prathey v. Westerly Water Works*, 37 Atl. Rep. 807.

Equity.
Pleading.
Multifariousness

The Court of Appeal of England has recently held, affirming the decision of Stirling, J., ([1897] 1 Q. B. 440.) that when a grantor who has no title purports by deed to convey to A. a piece of land for life, with remainders over, and A. enters upon the land under the deed, and afterwards acquires a good title by possession against the true owner, A. and his privies are estopped, as against the remainderman, from disputing the validity of the deed: *Dalton v. Fitzgerald*, [1897] 2 Ch. 86.

Estoppel.
Deed from
Grantor
without Title.
Acquisition of
Title by
Grantee

The Flatchcraft Insurance Manual, with the mortuary tables therein contained, is admissible to prove the expectancy of life of one deceased, it being shown that it is a standard authority among insurers: *Missouri, K. & T. Ry. Co. of Texas v. Ransom*, (Court of Civil Appeals of Texas,) 41 S. W. Rep. 826.

Evidence.
Expectation
of Life

The Supreme Court of Alabama holds, that the federal courts do not have exclusive jurisdiction of the offense of obtaining money under the false pretense of being a pension agent, but that one who falsely pretends to be such is punishable under § 3811 of the Code of 1886, defining the offense of obtaining money under false pretenses: *Pearce v. State*, 22 So. Rep. 502.

False
Pretenses.
Pension
Agent

The Court of Appeal of England has recently decided that a right to fish, created by a deed conveying "the exclusive right of fishing" in a certain river, with a proviso that "the right of fishing hereby granted shall only extend to fair rod and line angling, and to netting for the sole purpose of procuring fish-baits," was not a mere license to fish, but a right to catch fish and carry them away; that it was therefore a *profit à prendre* and an incorporeal hereditament; that the grantee had a right of action against any one who wrongfully did any act by which the enjoyment of the rights given to

Fishing.
Grant of
Fishery.
Action by
Grantee

him by the deed was prejudicially affected; and that therefore he could maintain an action against one who wrongfully discharged certain sediment into the stream, thus driving away the fish and injuring the breeding: *Fitzgerald v. Firbank*, [1897] 2 Q. B. 96.

A common fishing line, fastened to an object on the bank and extending into the water, with one hook thereon, is not a "set line:" *State v. Stevens*, (Supreme Court of Vermont,) 38 Atl. Rep. 80.

Under Penal Code Wash. § 63, which provides that every person who shall falsely make . . . "any record, deed, will, codicil, bond, writing obligatory, promissory note for money or property, receipt for property, power of attorney, certificate of a justice of the peace or other public officer, auditor's warrant, treasury note, county order, acceptance or indorsement of any bill of exchange, promissory note, draft or order, or assignment of any bond, writing obligatory, or promissory note for money or property, or any other instrument in writing, . . . shall be deemed guilty of forgery;" a mere account, which creates no obligation, and is of itself neither an evidence of debt nor of title, is not the subject of forgery: *State v. Heaton*, (Supreme Court of Washington,) 49 Pac. Rep. 493.

Under a statute (Rev. Stat. Tex. 1895, Art. 252,) which provides that no "current wages for personal services shall ever be subject to garnishment," past-due wages left in the employer's hands because of inability to collect them are exempt, but not past-due wages voluntarily left with the employer. These cease to be current wages: *Davidson v. F. H. Logeman Chair Co.*, (Court of Civil Appeals of Texas,) 41 S. W. Rep. 824.

The Circuit Court of Appeals for the Second Circuit, in *Hurlbut v. Turnure*, 81 Fed. Rep. 208, affirming 76 Fed. Rep. 587, has held that a mere deficiency of five or even ten tons below the customary and probably adequate supply of coal for a contemplated voyage does not make the ship an insurer against damages, so as to exempt the cargo from a general average charge in respect of damages not due to the deficiency; but that a steamship which fails to take the customary supply of coal for a voyage must be presumed to voluntarily assume the risk of putting into a port of refuge to complete her supply; and

General
Average,
Short
Coal Supply,
Liability of
Ship,
Port of
Refuge,
Expenses

Fishing

Forgery

Garnishment,
Exemption,
Wages

she will therefore be chargeable with the expenses of the port of refuge, even if, as it turns out, she would have been obliged, because of delays from adverse storms, to seek such port for a further supply had she started with the usual quantity.

The Supreme Court of Ohio has adopted the prevalent rule that death caused by accidental drowning is death "through external, violent, and accidental means," within the meaning of the stipulation of an accident policy which insures against death by such means: *United States Mut. Acc. Assn. v. Hubbell*, 47 N. E. Rep. 544.

There is "a total loss" of an insured building when the only portions of it left unimpaired are the foundations and a part of a wall which cannot be utilized at a less expense than if built anew: *O'Keefe v. Liverpool, L. & G. Ins. Co.*, (Supreme Court of Missouri, Division No. 2,) 41 S. W. Rep. 922.

The Supreme Court of New York, Appellate Division, Fourth Department, affirming *Lawrence v. Schaefer*, 42 N. Y.

**Lloyd's
Policy,
Suits**

Suppl. 992, 1897. (36 AM. L. REG. N. S. 202.) holds that a stipulation in a Lloyd's insurance policy executed by one of the underwriters for himself, and as attorney in fact for the others, that no action to enforce the provisions of the policy shall be brought except against said attorney who is designated to represent all the underwriters, and that each will abide the result of that action, is valid, and precludes separate actions against the several underwriters until their liability has been fixed on the action against the attorney: *Lawrence v. Schaefer*, 46 N. Y. Suppl. 719.

In a case recently heard by Collins, J., of the Queen's Bench Division, a ship, insured under a policy covering war risks,

**Marine
Insurance,
Capture,
Return of
Vessel,
Total Loss**

was captured by a cruiser belonging to one of two belligerent governments, while carrying contraband of war destined for the other. The shipowners thereupon gave the underwriters notice of abandonment, which was refused; and shortly afterwards they began an action on the policy. The prize court decreed the vessel to be lawful prize, but the war being then at an end, did not confiscate her, but ordered that she be returned to her owners. At the trial of the action on the policy, the court reserved for further consideration the point as to the effect of the restoration; but came finally to the conclusion that as it was after the bringing of the action, it di

not disentitle the owners to recover as for a total loss: *Rays v. London Assurance Corporation*, [1897] 2 Q. B. 135.

The governor of a state has the power to revoke his warrant for the surrender of an alleged fugitive from justice at any time before he is taken out of the state; and if, in a *habeas corpus* proceeding in behalf of the alleged fugitive, it appears that the warrant has been revoked, he must be discharged. The grounds of the revocation cannot be inquired into: *State v. Todd*, (Supreme Court of Minnesota,) 72 N. W. Rep. 53.

An action may be brought in respect of an act committed without the jurisdiction of the forum, if the act is wrongful both there and in the country where it is committed; but the act need not be the subject of civil proceedings in the foreign country; a libel which would ground a criminal prosecution there may be the subject of an action for damages in the forum: *Machado v. Fontes*, (Court of Appeal of England,) [1897] 2 Q. B. 231.

A mere unexecuted intent to remove, without any attempt to carry it into effect, is not an attempt to remove in any sense of the term, and will not justify the landlord in distraining under a covenant in a lease authorizing immediate distress for the balance of rent for the term upon either removal or attempted removal: *Klein v. McFarland*, (Superior Court of Pennsylvania,) 5 Pa. Super. Ct. 110.

The Court of Appeal of England has recently held, that when the publication of a libel is admitted, the plaintiff should not be allowed to inspect a document which the defendant admits is in his possession, but claims to be merely the original contribution, as published by him. The plaintiff has no right to thus compel disclosure of the author of the libel: *Hope v. Brash*, [1897] 2 Q. B. 188.

Kekewich, J., of the Chancery Division of the Supreme Court of Judicature of England, has laid down the principle that any one who is in the present enjoyment of an access of light to his premises for a special or extraordinary purpose, such as taking photographs, may have an injunction against interference with that access of light, irrespective of the length of

time he has enjoyed it, provided that his enjoyment be prior to the interference: *Lazarus v. Artistic Photographic Co.*, [1897] 2 Ch. 214.

This case overrules *Lanfranchi v. Mackenzie*, 4 L. R. Eq. 421, 1867, where an injunction was refused a firm of silk merchants against the erection of a building which would interfere with the light coming to their windows, causing a glare which was wholly unsuited for the purpose of sampling raw silk. In the present case the interference was also by producing a glaring light unfitted for photographic purposes. The principle here announced seems also founded on better reason than that in *Lindsey v. First Natl. Bk.*, 115 N. C. 553, 1894, where it was held that the lessees of the second story of a building for the purpose of taking photographs had no right of action against one who erected a building upon the adjoining lot and obstructed their windows, though their lessor owned the adjoining strip of land upon which the wall was erected.

When, by contract, the parties buy lots of different values, each paying one hundred dollars, and the lot each purchaser is to receive is determined by drawing

Lotteries from a box a card with the description of the lot upon it, the transaction is a lottery: *Paulk v. Jasper Land Co.*, (Supreme Court of Alabama,) 22 So. Rep. 495.

Barr, District Judge of the Circuit Court for the District of Kentucky, has rendered a very important decision in reference to the right of the postoffice authorities to seize mail matter under what is known as a fraud order.

**Mails,
Fraud Orders,
Powers of
Post-Office
Authorities**

He holds, (1) That the act of Congress of March 2, 1895, authorizing the postmaster general, on a determination upon evidence satisfactory to him that a person or company is using the mails for the purpose of conducting a lottery or other fraudulent scheme, to order a postmaster to return to the senders all mail received at his office directed to such person or company, or his or its agents or representatives, is within the powers of Congress to prescribe what matter shall be excluded from the mails; but that the postmaster general has no power to order such mail matter to be sent to the dead-letter office, without regard to whether such matter is or is not non-mailable; (2) That the refusal of the postmaster to deliver mail matter addressed to a private

person, a citizen of the United States, and the return of such mail to the senders, or to the dead-letter office, without regard to whether it is non-mailable, though done in pursuance of an executive order of the postmaster general, on a determination by him that the person to whom such mail is addressed is using the mails for unlawful purposes, is a violation of the fourth amendment to the constitution, securing the people against unreasonable seizures of their papers and effects; and (3) That the circuit court has jurisdiction to grant an injunction restraining a postmaster from withholding mail matter from a citizen to whom it is directed, under an order of the postmaster general which was beyond the scope of his constitutional authority: *Hoover v. McChesney*, 81 Fed. Rep. 472.

The Court of Appeals of Maryland has recently decided that a pastor rightfully instructing a doorkeeper of a church to admit only such as have tickets is liable for injuries resulting from the use of unnecessary force by the doorkeeper in preventing one who had no ticket from entering; but he will not be liable for the act of the doorkeeper in directing a police officer to arrest one who seeks to enter without a ticket, on the ground of a false arrest, since the doorkeeper in so doing does not act within the apparent scope of his authority: *Barabass v. Kabat*, 37 Atl. Rep. 720.

The Supreme Court of the Northwest Territories has declared valid an ordinance of the Legislative Assembly providing that "it shall be lawful for any justice of the peace, on complaint on oath by any employe or other servant, of ill-usage, non-payment of wages, the same having been first demanded, or improper dismissal by his master or employer, to cause such master or employer to be brought before him, and upon proof to his satisfaction of the complaint being well founded, to order such complainant to be discharged from his employment, and to order such master or employer to pay such complainant one month's wages in addition to the amount of wages then actually due him, not exceeding two months' wages, as aforesaid, together with the costs of prosecution, the same to be levied by distress and sale of the offender's goods and chattels, and, in default of sufficient distress, to be imprisoned for any term not exceeding one month, unless the said moneys and costs be sooner paid: *In re Gover*, 17 Can. L. T. 298.

The Supreme Court of Pennsylvania has lately ruled,
 (1) That it is an unlawful intimidation of employes for a large number of persons to surround them, and follow them for a considerable distance, urging them in a hostile manner not to go to work, and calling them opprobrious names, though no actual physical violence is used; (2) That when laborers are going to a place of employment, whether under contract or in search of work, others have no right to stop them and occupy their time without their consent, (or that of their employer, if actually employed,) in order to peacefully urge them not to go to work; and (3) That those who commit such unlawful acts are liable to the employer in damages: *O'Neil v. Behannar*, 37 Atl. Rep. 843.

So, whenever a person by means of fraud or intimidation procures either the breach of a contract or the discharge of a plaintiff from an employment, which, but for such wrongful interference, would have continued, he is liable in damages for such injuries as naturally result therefrom; and the rule is the same whether by these wrongful means a contract of employment, definite as to time, is broken, or an employer is induced, solely by reason of such procurement, to discharge an employe whom he would otherwise have retained, even if the terms of the contract of service are such that the employer may do this at his pleasure, without violating any legal right of the employe. It is not, however, necessarily unlawful merely to induce another to leave an employment or discharge an employe, by persuasion or argument, however whimsical, unreasonable, or absurd: *Perkins v. Pendleton*, (Supreme Judicial Court of Maine,) 38 Atl. Rep. 96. (See note in this issue.)

The lessee of a mine is not liable in damages to the owner of the surface, who has acquired a right to have the buildings thereon uninjured by underground workings, for injury occasioned to the buildings by reason of subsidence happening during the currency of the lease, caused not by any act of commission on the part of the lessee, but due to an excavation underground, made by the lessee's predecessor in title prior to the date of the lease: *Greenwell v. Low Beechburn Coal Co.*, (Bruce, J., of the Queen's Bench Division,) [1897] 2 Q. B. 165.

Strikes,
Intimidation
of Employes,
Liability to
Employer

Mines and
Mining
Subsidence,
Liability of
Lessee

Maxey, District Judge, of the District Court for the Western District of Texas, has lately rendered a decision involving two very interesting questions in regard to the naturalization of aliens, holding (1) that native citizens of Mexico, whatever may be their status from an ethnological point of view, are eligible to American citizenship, and may be naturalized on complying with the provisions of the naturalization laws; and (2) that an alien who is ignorant and unable to read and write, and who cannot explain the principles of our constitution, is nevertheless entitled to be naturalized, when it is clearly shown that he is a thoroughly law-abiding and industrious man, of good moral character: *In re Rodriguez*, 81 Fed. Rep. 337.

The practice in respect of the point involved in the second ruling is different in most other courts.

A corporation which has received from public authority a franchise which also provide for the accomodation of the general public, owe a duty to serve all persons who make proper application for such service and who comply with such reasonable rules as may be fixed and make such reasonable compensation as may be required; and a refusal or neglect to render such service when asked or contracted for may give a cause of action *ex delicto*. Accordingly, when a natural gas company negligently fails to supply fuel gas, and cuts it off suddenly and without notice, to the injury of the health of its customers, a cause of action arises which is neither dependent upon a contractual relation between the parties nor liable to be defeated by proof of such a contractual relation: *Hochle v. Allegheny Heating Co.*, (Superior Court of Pennsylvania.) 5 Pa. Super. Ct. 21.

In a case recently decided by the Supreme Court of New York, Appellate Division, Second Department, two policemen were sent out with a police ambulance to bring in a prisoner, one of them being detailed by their superior officer to drive, and the other to remain inside the ambulance. While crossing a railroad track, the ambulance was struck by an engine, and the policeman inside was killed. Under the circumstances; it was held that the negligence of the driver, if any, was not imputable to the deceased, since the former had the exclusive management of the vehicle: *Bailey v. Jordan*, 46 N. Y. Suppl. 399.

When, by the use of an infringing device, in connection with a city's fire engine, the number of men required with each

**Patents,
Infringement,
Profits** engine was reduced, the amount of their wages should be included in the computation of savings or profits, though the city did not in fact reduce the number of men employed, but either used them for other purposes or allowed them to remain idle: *Campbell v. Mayor, etc., of City of New York*, (Circuit Court, S. D. New York,) 81 Fed Rep. 182.

**Principal and Agent,
Insurance
Brokers,
Liability** The Supreme Court of New York, Appellate Division, Second Department, has recently ruled that persons who hold themselves out as insurance brokers assume to have the requisite knowledge, information, ability and skill to transact such business for their patrons, and to use reasonable care, skill and diligence in so doing; and consequently, if such brokers, when employed to procure insurance, place it in a company which has never been authorized to do business in the state, and from which they are not licensed to procure policies, they are chargeable with negligence, since the policy is void, and are liable for its consequences, if injurious to their employer: *Burges v. Jackson*, 46 N. Y. Suppl. 326.

**Public Officers,
Officers de facto,
Appointment,
Compensation** The Court of Errors and Appeals of New Jersey has lately held, that one who, by the appointment of one who has apparent authority to appoint, and apparently exercises that authority, becomes a public officer *de facto*, without dishonesty or fraud on his part, and renders the services required of the incumbent of the office to which he has so been appointed, may recover the compensation provided for such services during the period of their rendition: *Erwin v. City of Jersey City*, 37 Atl. Rep. 732.

This decision is authority only where there is no officer *de jure*. If there is such an officer, he is entitled to the emoluments of the office, whether he performs the services or not, provided his failure is not due to his own fault; and the *de facto* officer cannot recover them, as the state would then have to pay them twice.

**Specific
Performance,
Continuous
Acts,
Railroad
Lease** The Court of Appeals of Kentucky has ruled that equity will decree specific performance of a contract to operate a railroad for a term of thirty years, for the benefit of mortgage bondholders, when there is no other adequate remedy, though the contract calls for continuous service, involving skill and judgment, and will require continuous supervision on the

part of the court: *Schmidt v. Louisville & N. R. R. Co.*, 41 S. W. Rep. 1015.

As a general rule, a contract for the performance of continuous services will not be enforced, since a court of equity cannot give its personal supervision to the enforcement of such a decree: *Grape Creek Coal Co. v. Spellman*, 39 Ill. App. 630, 1891; *Roberts v. Kelsey*, 38 Mich. 602, 1878, and consequently, the courts have refused to enforce a contract for the operation of a railroad, or a street railway: *Johnson v. Shrewsbury & Birmingham Ry. Co.*, 3 DeG., M. & G. 914, 1853; *City of Kingston v. Kingston El. Ry. Co.*, 33 Can. L. J. 395, (1897); *Shackley v. Eastern R. R. Co.*, 98 Mass. 93, 1867; *Port Clinton R. R. Co. v. Cleveland & Toledo R. R. Co.*, 13 Ohio St. 544, 1862; *McCann v. South Nashville St. R. Co.*, 2 Tenn. Ch. 773, 1877; a contract that one party should use his skill and machinery in the manufacture of a certain article, while the other party agreed to purchase the manufactured article from him, to the extent of the market demand, on condition that the manufacturer should sell exclusively to him: *Bickford v. Davis*, 11 Fed. Rep. 549, 1882; and a contract by which the complainant agreed to furnish steam power delivered to the pulley of an electric dynamo of the power of one hundred kilowatts, and to furnish the power "constant" for eighteen hours per day, from six o'clock A. M. to 12 o'clock P. M., and to furnish all oil and waste and attendance for the running of the generator and other apparatus, taking reasonable care of them, without responsibility for ordinary wear and tear and for accidents, while the defendant agreed to furnish generators and other electrical apparatus, to be placed in the station or power house of the complainant, and to keep them in good repair, connected by belt, ready for the pulley of the engine to be attached to the pulley of the generator, and to pay a daily sum for a specified number of cars: *Electric Lighting Co. of Mobile v. Mobile & S. H. Ry. Co.*, 109 Ala. 190, 1896.

Railroad leases and traffic contracts form a marked exception to this rule, and such contracts will be enforced whenever the remedy at law is inadequate, either directly, or by enjoining acts in violation of the contract. *Wolverhampton & Walsall Ry. Co. v. London & N. W. Ry. Co.*, 16 L. R. Eq. 433, 1873; *Chicago & Alton R. R. Co. v. Chicago & N. W. Coal Co.*, 79 Ill. 121, 1875; *D., L. & W. R. R. Co. v. Erie Ry. Co.*, 21 N. J. Eq. 298, 1871; *Cornwall & Lebanon R. R. Co.'s Appeal*, 125 Pa. 232, 1889; *Contra, Blakett v. Bates*, 1 L. R.

Ch. 117, 1865; *Powell Duffryn Steam Coal Co. v. Taff Vale Ry. Co.*, 9 L. R. Ch. 331, 1874.

In *Prospect Park & Coney Island R. R. Co. v. Coney Island & Brooklyn R. R. Co.*, 144 N. Y. 152, 1894, reversing 66 Hun, 366, 1892, the plaintiff corporation operated a steam railroad running from Coney Island to a depot in the City of Brooklyn, and also certain horse car lines in that city. The defendant corporation was engaged in operating certain horse car lines in the city and a line in Coney Island. They entered into a contract by which the plaintiff granted to the defendant the use of certain of its tracks in the city, from a point named to the said depot, for twenty-one years, from June 1, 1882, free of charge, while the defendant covenanted to run cars to plaintiff's depot to connect with the trains of the latter, running to and from the island. Either party could terminate the contract on six months' notice. The parties acted under the contract for over seven years, when the defendant adopted the trolley method of propelling cars by electricity upon its road between the city and the island, ceased to run its cars to the depot, and informed plaintiff that it did not intend to do so. The plaintiff then brought suit to compel the specific performance of the contract, and the court held that the electrical method of propulsion adopted by the defendant could not be regarded as the use of steam as a motive power, and did not bring the case within the provision providing for the termination of the contract, and that the plaintiff was therefore entitled to the relief sought.

So, in *Seaboard Air Line Belt R. R. Co. v. Western & Atlantic R. R. Co.*, 97 Ga. 289, 1895, one railroad company contracted with another, upon valuable consideration, to "interchange business, both through and local," with the latter and its connecting lines for a specific term of years, "upon terms as favorable and advantageous to said road and its connecting lines as those given to any other railroad in a designated city." It was held that this contract bound the former company not only as to freight shipped from or to points on its own line, but also as to freight destined or coming from points beyond the same, and it therefore could not, so long as it pursued a different and more favorable course as to other railroads entering the city in question, lawfully do anything to deprive the other party to the contract and its connections of the benefit of "through rates and through proportions of rates, and bills of lading provided therein," as to freights of the latter class; and that though

the specific performance of such a contract could not be decreed (as to which *quære*, in view of the other decisions here cited,) the defendant would be enjoined during the life of the contract from voluntarily entering into or maintaining business relations with transportation companies beyond its own line, with the intention or purpose of depriving the plaintiff of the benefit thereof, and with such intention or purpose refusing to receive from such transportation companies shipments of freight routed over the plaintiff's line and upon bills of lading giving to it the benefit of "through rates and through proportions" upon such shipments.

Such contracts will also be enforced between the successors of the parties: *In re Application of Rome, Watertown & Ogdensburg R. R. Co. v. Ontario Southern R. R. Co.*, 16 Hun, (N. Y.) 445, 1879; *Bald Eagle Valley R. R. Co. v. Nittany Valley R. R. Co.*, 171 Pa. 284, 1895.

In *Cumberland Valley R. R. Co. v. Gettysburg & Harrisburg R. R. Co.*, 177 Pa. 519, 1896, a contract was thus enforced which provided, *inter alia*:

Fourth. It is hereby covenanted and agreed by the parties hereto, that they will promote and facilitate the interchange of cars and business between their respective roads—that they will issue coupon tickets for passengers and through bills of lading for freight interchanged between the said lines, and that the earnings from joint business exchanged with the Gettysburg & Harrisburg Railroad shall be apportioned to and between the parties hereto on such a mileage basis as shall be agreed upon between the parties hereto.

Fifth. The parties of the third and fourth parts hereby respectively covenant and agree that they will, so far as they lawfully can, send to destination all traffic controlled by them, *via* the lines of the parties of the first and second parts hereto.

Sixth. It being the intent of the parties hereto that their lines shall be worked as far as possible in harmony with each other, the Pennsylvania Railroad and the Cumberland Valley Railroad Companies hereby agree that they will, so far as they can consistently with their obligations to other parties, make such arrangements as will promote the development of a ~~and~~ interchange of traffic with the other parties hereto, and that they will receive at all points controlled by them, and promptly transport the traffic originating on or to be delivered to the Gettysburg & Harrisburg Railroad and passing over the ~~the~~ lines to or towards its destination at as favorable rates as they accord to any competing line or other parties upon like traffic.

And the said South Mountain Railway and Mining Company and the Gettysburg & Harrisburg Railroad Company agree that they will receive and transport promptly over their lines and upon as favorable terms as they give to any other parties, all traffic tendered to them by the Pennsylvania Railroad Company, or the Cumberland Valley Railroad Company, or lines controlled by them and destined to points upon their said lines."

Similarly, in *Joy v. St. Louis*, 138 U. S. 1, 1891, affirming 29 Fed. Rep. 546, 1886, the commissioners of Forest Park, St. Louis, of the first part, the St. Louis County Railroad Company of the second part, and the St. Louis, Kansas City and Northern Railroad Company of the third part, entered into what was known as the "tripartite agreement," by which (par. 9) the "said party of the second part shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the City of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies." Under this it was held that the successor of the Kansas City Company was bound to permit the St. Louis, Kansas City and Colorado Railroad Company to use the right of way to the terminus of its road, that the tripartite agreement created an easement in the property of the County Company and the Kansas City Company, for the benefit of the public, which might be availed of, with the consent of the public authorities, properly expressed, by other railroad companies which might wish to use not only the right of way through the park, but also that between the park and the terminus; and that the specific performance of the agreement could be enforced by enjoining the successor of the Kansas Company from preventing the Colorado Company from using the right of way.

Sundays are not to be included in computing the period of ten days, within which the governor is required to pass upon a statute submitted to him, under a constitutional provision, (Const. Ill., Art. 5, § 16,) providing that "any bill which shall not be returned by the governor within ten days, (Sundays excepted,) after it shall have been presented to him, shall become a law in like manner as if he had signed it, unless the general assembly shall, by their adjournment, prevent its return, in which case it shall be filed, with his objections, in

Statutes.
Submitted
to Governor.
Computation
of Time

the office of the secretary of state, within ten days after such adjournment, or become a law:" *People v. Rose*, (Supreme Court of Illinois,) 47 N. E. Rep. 547.

When two irreconcilable statutes are approved upon the same day, resort may be had to the office of the secretary of state, and also to the published statutes, for information as to the order of their approval, and the one that is found to have been approved last is the prevailing law: *Davis v. Whidden*, (Supreme Court of California,) 49 Pac. Rep. 766.

When a state becomes the owner of stock in a corporation, it lays down its sovereign character, and puts itself on an equality with private stockholders; and consequently the corporation and its directors and controlling officers, though in part appointed by the state, and specially representing its interests, may be sued in the federal courts in respect of contracts entered into by the corporation, to the same extent as a corporation wholly owned and controlled by private individuals; and when the governor and attorney general are invested by law with the control of all suits in relation to the property of the state in such corporation, they are proper parties defendant to a suit in equity to establish the validity of a lease of the property of the corporation, and enjoin threatened attacks thereon: *Southern Ry. Co. v. North Carolina R. R. Co.*, (Circuit Court, N. D. North Carolina,) 81 Fed. Rep. 595.

An agreement by which one who enters the employ of a manufacturer of a medicine compounded by a secret process, not to make or sell any of the medicine, or reveal the secret of its composition, is not in restraint of trade, and will be enforced by injunction; and, further, equity will not permit one who has sold for a valuable consideration the absolute and exclusive property in a medicine compounded by a secret process to reveal that secret to a third person, either by himself or through a member of his family, and will restrain by injunction the use of such a secret, if revealed: *C. F. Simmons Medicine Co. v. Simmons*, (Circuit Court, E. D. Arkansas,) 81 Fed. Rep. 163.

Ardemus Stewart.

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INTIMIDATION OF EMPLOYES. A recent case decided by the Supreme Court of Pennsylvania, *O'Neil v. Behanna et al.*, 37 Atl. Rep. 843 (Penna.) (July 15, 1897), clearly lays down the law concerning intimidation of employes by strikers or other persons in endeavoring to induce them to quit work. The court holds that it is an unlawful intimidation of employes for a large number of persons to surround them, and to follow them for a considerable distance, urging them in a hostile manner not to go to work, and calling them opprobrious names, though no physical violence is used, and persons so doing are liable in damages to the employer. That when persons are going to a place of employment, either under contract to work or in search of work, others have no right to stop them and occupy their time without their consent or that of their employer if actually employed, in order to peacefully urge them not to go to work; and persons so doing are liable to the employer in damages.

This decision was a reversal of a decree for defendants in a bill in equity by Margaret O'Neil against Noah Behanna and others for an injunction and damages.

In Pennsylvania it is of great importance that the courts should clearly and firmly maintain the grounds they have taken on this subject, since the legislature has by statutes exempted employees from liabilities for unlawful combinations to fix the price of labour: Acts May 8, 1869, P. L. 1260; June 14, 1872, P. L. 1175; April 20, 1876, P. L. 45, and June 16, 1891, P. L. 300.

The constitutionality of these acts was questioned in *Cole v. Murphy et al.*, 159 Pa. 420 (1894), on ground that they embraced only a particular class of citizens, but this point was not decided. Should these acts be upheld and striking employees be exempt from liabilities for their unlawful combination, it becomes of the greatest importance that the courts should guard the interests of the employers and of those employees who wish to work by clearly pointing out what constitutes intimidation or interference and by rigidly restraining reckless or irresponsible men from overstepping the line.

The decision is in accord with those in similar cases in the United States Courts as well as previous decisions in Pennsylvania. In *re Doolittle and another, strikers*, 23 Fed. Rep. 544 (1885), it was held that a simple "request" to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimidation, with a design to hinder or obstruct employees in the performance of their duties, is not less obnoxious than the use of physical force for the same purpose. A "request" under such circumstances is a direct threat and an intimidation, and will be punished as such. To the same effect, *U. S. v. Kane*, 23 Fed. Rep. 748 (1885).

In *Murlock, Kerr & Co. v. Walker et al.*, 152 Pa. 595 (1893), it was held that a court of equity will restrain by injunction discharged employees, members of a union, from gathering about their former employer's place of business, and from following the workmen whom he has employed in place of the defendants, from gathering about the boarding houses of such workmen, and from interfering with them by threats, menaces, intimidation, ridicule, and annoyance, on account of their working for the plaintiff.

PRESUMPTION OF MOMENT OF DEATH; SURVIVORSHIP. Valuable property rights often depend upon the question whether or not one of two persons who perished in the same disaster survived the other for any appreciable time. The Supreme Court of Rhode Island recently decided that where three sisters were killed in the same accident, the burning of their house, there was, in the absence of all evidence, no presumption that any of them survived the others: *In re Wilbur et al.*, 37 Atl. Rep. 634 (June 8, 1897).

While the law on this subject is now well settled to be that laid down in the above case, it did not take its present form without many conflicting decisions. The difficulty arose from the fact that the civil law had a definite rule on the subject, and its influence, especially in the ecclesiastical courts, warped the minds of English

judges from the principle of the common law. According to the civil law there is a definite series of presumptions arising from the age and sex of the victims. For instance, a person under fifteen or over sixty years of age is presumed to have perished before one between those ages, while one of the male sex is presumed to have outlived a female. This is the law to-day in Louisiana and California: *Code Napoleon*, §§ 720-722; *Louisiana Civil Code*, §§ 936-939; *California Code*, § 1963, c. 40.

In England the question of presumption of survivorship first arose in the case of *Rex v. Hay*, 1 W. Bl. 640 (1767). Lord Mansfield refused to give a decision on the point, saying that there was no precedent, and the case was compromised. However, several later cases definitely followed the rule of the civil law, holding that a husband was presumed to have outlived a wife, and that where two brothers died together the stronger was presumed to have outlived the weaker: *Cotrin v. Procurator-Gen.*, 1 Hagg. 92 (1827); *In re Selwyn*, 3 Hagg. 748 (1831); *Sillick v. Booth*, 1 Young & Coll. 117 (1842).

But the effect of these decisions has been swept away by the leading case of *Underwood v. Wing*, 19 Beav. 459, affirmed in the House of Lords under the title *Wing v. Angrave*, 8 H. L. C. 183 (1860). In this case one Underwood and his wife left England on a ship which was wrecked, all being lost except one man, who testified that Underwood and his wife were washed overboard by the same wave. A contest having arisen over Underwood's will, one of the provisions of which made a certain disposition of property "in case my said wife shall die *in my lifetime*," the question was fairly presented to the court. Although a strong effort was made by counsel to show that the survivorship of the husband must be presumed, on the authority of the cases cited above, together with the fact that Underwood was an active man, a strong swimmer, etc., yet the Master of the Rolls refused to so decide, laying down the rule that where there is no evidence of survivorship then no presumption arises that either party died first, but the person who comes into court basing his claim on survivorship must affirmatively prove that survivorship. This rule has been universally followed in all the courts of the United States except those of California and Louisiana.

The case of *Underwood v. Wing* did not decide that, in the absence of all evidence to the contrary, a presumption arose that the man and wife perished at the same moment. "This," says Mr. Best in his work on Evidence, Am. Ed., p. 395, "would be establishing an artificial presumption against manifest probability. The practical consequence is, however, nearly the same; because, if it cannot be shown which died first, the fact will be treated by the tribunal as a thing unascertainable, so that, for all that appears to the contrary, both individuals may have died at the same moment." Moreover, the rule will not be applied unless evidence on the question is *wholly* lacking. Very slight evidence will be

regarded as sufficient, such as the position of the victims when the disaster occurred; in short, all relevant facts except those which show merely the physical condition of the parties and their ability to resist death: *Newell v. Nichols*, 12 Hun, 604, affirmed 75 N. Y. 78 (1878); *Ehle's Est.*, 73 Wis. 445 (1889).

NATURAL GAS; "MINERALS FERRE NATURE"; CONSTITUTIONAL LAW; PUBLIC POLICY. In *Townsend v. State*, 47 N. E. 19 (Indiana) May 18, 1897, it was decided that an act punishing the burning of natural gas in flambeau lights as a wasteful use thereof, does not deprive the owner of property without due process of law, nor does it take property by law without just compensation. This marks another successful attempt on the part of the legislature to control the use of natural gas. *State v. Gas Company*, 120 Ind. 575, 22 N. E. 778 (1889) declared unconstitutional a law prohibiting the piping of natural gas to any point without the state. This law was said not to be a legitimate exercise of police power, but an attempt to regulate interstate commerce. *Jamieson v. Oil Company*, 128 Ind. 555, 28 N. E. 766 (1891) (Olds, J., dissenting,) held constitutional an act prohibiting a pressure of more than 300 pounds to the inch, which was designed to accomplish, and did accomplish, indirectly, the same end as that to which the former statute was directed. *People's Gas Company v. Tyner*, 131 Ind. 277 at 281, 282 (1892), quoting *W'estmoreland, etc., Gas Co. v. De Witt*, 130 Pa. 235, 18 Atl. 724 (1889), classes water, oil and gas as minerals *ferre nature* subject to the same public control as wild animals.

The principal case follows this and finds justification for state regulation of natural gas and oil in the admitted right to pass game laws. On game and game laws, see 8 Am. & Eng. Ency. Law 1024, *et seq.* In *Commonwealth v. Gilbert*, 160 Mass. 157 35 N. E. 454 (1893) a statute imposed a penalty on every person who "sells or offers or exposes for sale or has in his possession a trout" except alive, during the close season. This statute was decided to apply constitutionally to trout artificially propagated and maintained. In *Gentile v. State*, 29 Ind. 409, at 415 (1868) a statute was decided to be constitutional which forbade the taking of any fish in any way for two years, even by an owner of the lake or stream.

The police power of the State over property has not been confined to things *ferre nature*. *Ridout v. Knox*, 140 Mass. 368, 19 N. E. 390 (1889) held constitutional an act declaring that any fence unnecessarily exceeding six feet in height maliciously erected or maintained for the purpose of annoying adjoining property holders or owners is a nuisance, and granting an action to anyone injured by such fence. In *Commonwealth v. Trunkbury*, 11 Metc. (Mass.) 55 (1846) the statute imposed a penalty on "any person who shall take, etc., any stones, gravel or sand, from any of the beaches in the town of Chelsea." This was held to apply to the

owners of the soil as well as to strangers and was constitutional, although it provided no compensation for the owners, since preservation of the sea wall was essential to the public.

But the most striking instances of the exercise of such power have been game laws. In *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499 (1894) (Fuller, C. J., Brewer and Field, JJ., dissenting,) the statute in question, declared nets, etc., used in violation of game laws, public nuisances which the official game protectors were authorized to destroy. The act was held constitutional. See *Smith v. Maryland*, 18 How. (U. S.) 74 (1855); *McCready v. Virginia*, 94 U. S. 395 (1876). In *Geer v. State of Connecticut*, 16 Sup. Ct. Rep. 600 (1896), not cited in the principal case, it was held that the ownership of game within the limits of a state, so far as it is capable of ownership, is in the State for the benefit of all its people in common, and that the police power authorizes a State to forbid the killing of game to be transported beyond its limits. Harlan and Field, JJ., dissented. Mr. Justice White, delivering the majority opinion, refers to Pothier's treatise on Property. Pothier classes among *res communes* air, water which runs in rivers, the sea and its shores, and animals *fera natura*; and the learned justice shows that property in wild beasts is regarded as common or in the state over all the continent of Europe. In 2 Blackstone's Commentaries, at pages 14, 394, 410, wild animals are classed with air, light and water as peculiarly subject to governmental authority.

The ownership, then, of gas and oil in their natural condition, as well as that of wild animals, being in the State, the latter can make such regulations concerning them as it sees fit. If this decision arrived at by the Supreme Court of Indiana be carried to its logical end, it would appear that the State may prescribe the exact manner in which the owners shall use the gas they have drawn from their own land, or even forbid absolutely the use of gas in any form.

CONSTITUTIONAL LAW; EXCLUSION FROM OFFICE; POLITICAL OPINION. A frequent provision in state constitutions, after providing a form of official oath, is that "no other oath, declaration, or test shall be required as a qualification for any office or public trust." The kind of "test" meant is generally believed to be a mental condition, such as religious or political opinion: 2 Story Const. §§ 1147, 1149. It is plain that where the constitution provides qualifications for holding office any legislative enactment conflicting therewith is void.

The question has been raised as regards the right of the legislature to require certain political affiliations as a qualification, in face of the above constitutional clause. This question was decided in *Pearce v. Stephens*, 45 N. Y. Suppl. 422 (May 18, 1897). In that case the statute in question provided that the two police commissioners of a certain district should not belong to the same

political party, nor be of the same political opinion on state and national politics. The act was held to be constitutional on the authority of *Rogers v. Common Council of Buffalo*, 123 N. Y. 173 (1890). In the latter case the court held that no person was excluded by reason of his political opinion, inasmuch as the act did not compel the selection to be made from any certain party or parties, but that all were equally eligible until two should be chosen from any one party. The act provided that no more than two of the board should be taken from the same party. The Supreme Judicial Court of Massachusetts sustained a similar statute: *Commonwealth v. Plaisted*, 148 Mass. 375 (1889).

In Michigan it is held that such an act is unconstitutional, because it makes party affiliation a condition to holding the office, and thus requires another "test" contrary to the constitution: *Attorney-Gen'l v. Detroit Common Council*, 58 Mich. 213 (1885). In Indiana the same view is taken: *Evansville v. State*, 118 Ind. 426 (1889); *State v. Blend*, 23 N. E. 511 (1890).

The better opinion seems to be that such provisions are discretionary only, and the statute valid: *State v. Seavey*, 35 N. W. 228 (Neb. 1887); *State v. Bennett*, Id. 235; *Baltimore v. State*, 15 Md. 376; *McDermott v. Lapham*, 27 Atl. 220 (R. I. 1894); *Comm. v. Plaisted (supra)*. See *State v. McAllister*, 18 S. E. 770 (W. Va. 1894); *Rathbone v. Wirth*, 40 N. Y. Suppl. 535 (1896).

BOND; LIABILITY OF CUSTODIANS OF PUBLIC FUNDS. *Boshyshell v. United States*, 16 U. S. C. C. A. 474 (1897). In the above case the Circuit Court of Appeals has lately passed upon the question of the liability of the custodians of public funds, for money stolen from them without any fault or negligence on their part. The defendant was the Superintendent of the United States Mint at Philadelphia. The condition of the bond sued upon was as follows: "Now, therefore, if the said B. shall faithfully and diligently perform, execute and discharge all and singular the duties of said office according to the laws of the United States, then this bond to be void and of no effect." Section 3506 of the United States Revised Statutes, which it was agreed should be read into the bond, is as follows: "The superintendent of each mint shall receive and safely keep until legally withdrawn all moneys or bullion which shall be for the use or expenses of the mint. He shall receive all bullion brought to the mint for assay or coinage; he shall be the keeper of all bullion or coin in the mint, except when the same is legally in the hands of other officers." The main question of law raised in the case was on the defendant's position that the bond in suit imposed upon him a liability only for the faithful and diligent performance of the duties of the office of superintendent and not a liability for a felonious taking of bullion without any fault or negligence on his part. The Court declined to take this position and cited the cases of *United States v. Prescott*, 3 How. 578 (1845); *U. S. v. Dashiell*, 4 Wall. 182

(1866); *Boyd v. U. S.*, 13 Wall. 17 (1871) in support of their decision that the obligation was to keep safely without qualification or exception. The defendant relied on *United States v. Thomas*, 15 Wall. 337 (1873), in which it was decided by a majority of the Court that the forcible seizure of public property by the public enemy, without fault or neglect of the officer in charge, excused compliance with the condition of the official bond, the Court thus distinguishing this case from *U. S. v. Prescott* (*supra*), and the subsequent cases affirming it. That decision was based on two grounds. 1. That the ordinary circumstances which would discharge a bailee for hire, were not sufficient to absolve a depositary of public funds, on account of an imperative necessity of public policy, viz., the prevention of collusive defenses. 2. That the depositary, having given a bond to pay or deliver, was bound by that contract, according to the rigid terms annexed by law to such covenants. From the decision in the latest decided case, *U. S. v. Thomas*, there was a strong dissent by Mr. Justice Miller, protesting against the attempted distinction in the facts of the cases, and the inevitable weakening of the principles underlying the rule by allowing an exception in the case of funds seized by public enemy. He believed in an entire abandonment of those principles as being incorrect, and said "on sound principles the bond should not be construed to extend the obligation of the depositary beyond what the law imposes upon him, though it may contain words of express promise to pay over the money. The true construction of such promise is to pay when the law would require it of the receiver if no bond had been given, the object of the bond being to procure sureties for the performance of the obligation." In this contention there is much force, and the near future may see it adopted as the rule.

Many of the state courts have reached a different conclusion from that of the United States Court of Appeals in this case: *York v. Watson*, 15 S. C. 1 (1879); *Cumberland v. Pennell*, 69 Me. 357 (1879). A well-considered case so holding is *People v. Wilson*, 19 Colo. 199 (1893), fully annotated in 22 Lawy. Rep. Ann. 449. See also *State v. Houston*, 78 Ala. 576 (1885).

The two following cases, both decided in 1896, go over the whole ground exhaustively, and conclude that to hold an officer to absolute insurance is neither equitable nor in accordance with the best precedent: *State v. Copeland*, 34 S. W. 427 (Tenn.); *Healdsburg v. Mulligan*, 45 Pac. 337 (1896), (Cal.).

LESSOR AND LESSOR; DEFECTIVE PREMISES; LESSOR'S LIABILITY TO STRANGERS. The Supreme Court of Rhode Island held in a recent case that a lessor who retains no control of the leased premises, the lessee being under covenant to repair, is not liable for an injury to one entering by the lessee's invitation, by falling into an unguarded opening between the freight elevator and the outer wall of the shaft; the building in such respect being neither a nuisance,

nor, by reason of secret defect, unfit for the purpose for which it was leased: *Hanson v. Beckwith*, 37 Atl. 702 (June 29, 1897).

The cases have been uniform on this subject in holding the lessor not liable to third persons where the demised premises have been exclusively in the control of the lessee and the lessor is not expressly bound by the lease to repair: *Szathmary v. Adams*, 44 N. E. 124 (Mass. 1896); *Glass v. Colman*, 45 Pac. 310 (Wash. 1896); *Kirby v. Association*, 14 Gray (Mass.) 249, 1859; *Inhabitants of Milford v. Holbrook*, 9 Allen, (Mass.) 17; *Gordon v. Peltzer*, 56 Mo. App. 599 (1895); *Lee v. McLaughlin*, 30 Atl. 65 (Me. 1895). But where the lessor retains control, or maintains a portion of the premises for the use of several lessees, he is liable to strangers for injuries received on such portion: *Mulloy v. New York Real Estate Association*, 34 N. Y. Supp. 679 (1895); *Davis v. Pacific Power Co.*, 40 Pac. 950 (Cal. 1895); *Markin v. Crumlie*, 35 N. Y. Supp. 1027 (1896). If the defect in the premises amounts to a nuisance and existed at the time the premises were let, the lessor can be held, although the tenant may also be liable to the person injured. This is on the ground that the lessor is taken to have contemplated the premises remaining in the condition in which he let them: *Clifford v. Atlantic Cotton Mills*, 15 N. E. 84 (Mass. 1888); *Dalay v. Savage*, 145 Mass. 38 (1887); *Tood v. Flight*, 9 C. B. (N. S.) 377 (1860); *Swords v. Edgar*, 59 N. Y. 28 (1874); *Joyce v. Martin*, 10 Atl. 620 (R. I. 1887). The lessor is also liable if the premises were not safe or fit for the purposes for which they were let: *Carson v. Godley*, 26 Pa. St. 111 (1856).

BOOK REVIEWS.

GENERAL DIGEST AMERICAN AND ENGLISH QUARTERLY ADVANCE SHEETS. No. 3, to April, 1897. Rochester, N. Y.: Lawyers' Co-operative Publishing Co.

This instalment of the General Digest, like all those recently preceding it, displays painstaking accuracy and complete comprehensiveness. The Lawyers' Co-operative Co. seem to have mastered thoroughly the difficult art of digest-making.

AMERICAN ELECTRICAL CASES. Edited by WILLIAM W. MORRILL. Vol. VI. Albany: Matthew Bender. 1897.

The series to which this volume belongs represents a collection of judicial decisions (other than patent causes) dealing with problems arising from the practical use of electricity. This volume, like its predecessors, contains a number of cases reported in full and a series of notes or annotations in which other reported decisions are summarized. The volume is provided with an exhaustive index, printed in two sizes of type, and cannot fail to be useful to the practitioner in search of authorities for his brief. Mt

is, of course, inevitable that cases collected together upon the basis of a purely objective classification should cover a wide range of legal topics, many of which have no exclusive connection with the subject-matter of the collection. It would be idle to criticise the collection upon this ground, for such a criticism would strike at the very root of the work and, if valid, would amount to a sweeping condemnation of the publication. That such a collection of cases has a practical value is undoubted. It is conceived, however, that the editor should endeavor to exclude from his collection cases in which it is a mere accident that the question under discussion arose in connection with the use of electricity. This is especially true in regard to the numerous cases which deal with problems in the law of negligence where electric car companies are defendants. Take, for example, the decision in *Mullen v. Springfield Railroad Co.* (page 492; also summarized on page 610). This decision is authority for the proposition that the motorman on an electric car "is not bound to anticipate that boy will jump from rear end of wagon about to meet car and step on track in front of car." It is conceived that the same measure of foresight in respect of the movements of small boys would be applicable in the case of a gripman on a cable car or of a driver on a horse car. It may be well to venture the further suggestion that the usefulness of the volume would be increased if it were preceded by some form of analysis or table of contents which would exhibit to the eye of the reader the subjects discussed in the cases and the theory upon which the sequence of the cases and their arrangement in the volume are determined.

G. W. P.

COMMENTARIES ON THE LAWS OF ENGLAND. By SIR WM. BLACKSTONE. Edited by WM. DRAPER LEWIS, Ph.D., Dean of Dept. of Law, University of Pennsylvania. Philadelphia: Rees Welsh & Co. 1897.

In the preface to this the latest and undoubtedly the best of all the editions of the Commentaries we read that "it is the purpose of the editor to accomplish in the notes certain things not heretofore attempted." It requires only a cursory glance at the work to be assured that this purpose has been thoroughly and carefully accomplished, for it abounds in features as useful as they are novel. Four sources of materials have been used by the editor in its preparation. First, the published results of modern research into the history of our law, such as the works of Maine, of Pollock and Maitland, and Vinogradoff. Second, the statutes in England and America which modify the statements made in the text. Third, the works of predecessors. Fourth, the cases decided and the text-books published since Blackstone's day, which have referred to him as authority. It can readily be seen that a thorough investigation of all these materials involved an immense amount of work,

and that if carefully done, it could not fail to be of immense practical use to lawyer and student alike.

There is room, however, for considerable difference of opinion as to whether in a work on the elementary principles of English law a profusion of notes is any great advantage. They are many who think the best results are obtained by having the student read the text of a work like Blackstone exclusive of editor's notes. Dr. Lewis, however, has written his work with a definite purpose clearly in mind, and, however much critics may differ as to the merits of that purpose, all must be agreed that he has certainly succeeded in producing "a mine of references to which one can turn when in search of information on any given point of law."

In many of the previous editions of Blackstone, there is plainly discernible a tendency to digest modern law with Blackstone as a sort of basis, but Dr. Lewis uses the notes as they should be used, for the purpose of elucidating the text, which it is well to note is in its unabridged form. In addition to his own notes he has selected the best from the editions of Archbold, Kerr, Christian, Coleridge, Chitty, Stewart, Sharwood and others, and has also cited every text-book and every case in which Blackstone has been referred to. He has thus accomplished the double purpose of combining his own thoughts with those of his predecessors thereby throwing much light on the text, and of giving us a many sided view of the law in its successive stages of development since Blackstone's time, thereby making his work thoroughly practical and eminently a book of to-day.

Still another feature of Lewis' edition, which is sure to find favor with many, is the translation into English of all the foreign phrases which occur so frequently throughout the commentaries, and the placing of them at the foot of the corresponding page of the text. Everything in the way of indexes, tables of cases cited, of foreign words and phrases is in its appropriate place. Baron Field's analysis, so valuable as a reference to the commentaries, is given complete.

Nothing, perhaps, serves better to show the estimation in which Blackstone is held than the numerous editions of his works which from time to time have been given to the world by men prominent in the profession. It has been said that what the *Principia* of Sir Isaac Newton was to natural philosophy, that the *Commentaries* of Blackstone have been to English law. They are indeed immortal. Each new edition gives them a new garb, and Dr. Lewis' work certainly adapts them more completely to present use. It will deservedly attain a high popularity with student, judge and practitioner.

J. A. M.

THE LAW OF SALES OF PERSONAL PROPERTY. By FRANCIS M. BURDICK, Dwight Professor of Law in Columbia University School of Law. Boston: Little, Brown & Co. 1897.

This volume constitutes the latest contribution to the "Students'

Series" of Little, Brown & Co. It is particularly adapted to the needs of students, not only by reason of the design and scope of the series of which it forms a part, but also because of Professor Burdick's experience in teaching, and his attempt in the present volume to overcome the difficulties most frequently encountered by students in the class-room. From this it results that all matters which belong properly to the field of pure contract or of tort, such as consideration, capacity of parties, mutual assent, illegality and fraud, are excluded, the student being supposed to have mastered them.

The book may be said to be rather an outline than a full and exhaustive treatise on the law of sales in all its ramifications. Yet the book suffers none on this account. The different views taken in different jurisdictions are succinctly indicated and the theories which go to support them advanced and discussed. In fact, the most noteworthy and commendable feature of the work is this same scholarly attempt to reconcile the present state of the law with its development and with the principles and theory of the English law. Professor Burdick has not devoted two-thirds of every page to citations, but he has selected a limited number of the leading cases, representative and illustrative of principles. Thus, though the book is not a digest of all the decisions, it is far from useless to the active practitioner, for it clearly presents the theory of the law of sales, illustrated and reinforced by the best of the cases.

A novel feature is the treatment of the provisions of the Statute of Frauds, bearing upon the sale of goods, in connection with the common-law topics to which respectively they relate. It is believed that this method will conduce to simplicity and ease of apprehension on the part of the student. The appendixes contain a sketch of the Continental legislation on the subject of sales, a copy of the English Sale of Goods Act, an outline of the legislation of the various states of this country and a valuable essay on "Judicial Interpretation of Factors' Acts." The book is printed and bound in the best style of the printer's art and is of a very neat appearance and handy size.

O. J. R.

BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked * will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.]

TREATISES.

DOMESDAY BOOK AND BEYOND. THREE ESSAYS IN THE EARLY HISTORY OF ENGLAND. By FREDERIC WILLIAM MAITLAND, LL.D., Downing Professor of the Laws of England in the University of Cambridge, of Lincoln's Inn, Barrister-at-law. Boston: Little, Brown & Co. 1897.

TWO COMPIFIED NEGOTIABLE INSTRUMENTS LAW OF THE STATE OF NEW YORK. Edited by JAMES W. EATON, Esq., of the Albany Bar, Instructor on Bills and Notes in the Albany Law School, and by H. NOYES GREEN, Esq., of the Troy Bar. Albany, N. Y.: Matthew Bender. 1897.

A TREATISE ON THE LAW OF INDIRECT AND COLLATERAL EVIDENCE. By JOHN H. GILLET, Judge Thirty-first Judicial Circuit of Indiana. Indianapolis and Kansas City: The Bowen-Merrill Company. 1897.

A TREATISE ON THE LAW AND PRACTICE OF FORECLOSING MORTGAGES ON REAL PROPERTY, AND OF REMEDIES COLLATERAL THEREUNTO. With Forms. By CHARLES HASTINGS WILSON, of the Rochester Bar. With a Supplement, bringing the work down to March, 1897, and Additional Chapters on MORTGAGE REDEMPTIONS, by JAMES M. KERR, of the New York Bar. In Two Volumes. Vol. II. Rochester, N. Y.: Williamson Law Book Company. 1897.

A HANDBOOK OF THE LAWS OF PENNSYLVANIA OF 1897. Edited by LINCOLN L. EYRE, LL.B., of the Philadelphia Bar. Philadelphia: J. L. H. Bayne, 725 Sansom Street. 1897.

STATE CONTROL OF TRADE AND COMMERCE BY NATIONAL OR STATE AUTHORITY. By ALBERT STECKNEY, of the New York Bar. New York: Baker, Voorhis & Co. 1897.

SELECTED CASES.

SELECTED CASES ON THE LAW OF SALES OF PERSONAL PROPERTY. Arranged to accompany BURDICK'S LAW OF SALES. By FRANCIS M. BURDICK, Dwight Professor of Law in Columbia University School of Law. Boston: Little, Brown & Co. 1897.

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THE PRINCIPLES OF THE LAW RELATING TO CORPORATE LIABILITY FOR ACTS OF PRO- MOTERS.

CHAPTER VIII.

WHERE THE PROMOTER'S CONTRACT PROVIDES FOR THE REN- DERING OF SERVICES PARTLY BEFORE AND PARTLY AFTER INCORPORATION.

§ 1. *A contract implied in fact.*

The second class of cases to be discussed comprises those in which the employment or benefits rendered by the plaintiff, and on account of which he is suing, were so rendered partially before and partially after incorporation, in compliance

¹ *Munson v. R. R.*, 103 N. Y. 58 (1886); *McArthur v. Times Printing Co.*, 51 N. W. 216 (Minn. 1892); *Schreyer v. Turner Mills Co.*, 43 P. 719 (Oregon, 1896); *Burden v. Burden*, 4 N. Y. Supp. 499 (1896).

² See ante.

³ *McArthur v. Times Printing Co.*, 51 N. W. 216 (Minn. 1892); *Schreyer v. Turner Mills Co.*, 43 P. 719 (Oregon, 1896).

with the terms of a contract made with the company's promoters; the company accepting that part rendered after incorporation with full knowledge of the terms of the contract.

As to the services rendered after organization, there are here, as in the former cases, all the elements of an implied contract. The question which arises, is as to whether there can be implied from the action of the company in accepting such services, a promise to pay not only for them but for those rendered before incorporation.

It would seem that since, by supposition, the corporation knew that the benefits which it accepted were rendered in compliance with the general terms of an arrangement under which former benefits had been conferred, it would not be a strained construction of its conduct to imply a promise on its part to pay for all. The only other question, therefore, would be as to whether, granting the promise, there was an adequate consideration to make it binding. And since the benefits rendered after incorporation would not have been conferred, except for the existence of the contract and the belief that compensation was to be made according to its terms, *i. e.*, for *all* the benefits rendered, there would seem to be a sufficient consideration moving to the corporation to support the implied promise to fulfil the promoter's engagement in all its particulars. In other words, the rendering of the services after incorporation is the consideration for the promise to pay for those formerly rendered.

In *McArthur v. Times Printing Co.*,¹ suit was brought for damages for breach of contract in discharging the plaintiff contrary to the terms of an agreement made by the promoters. Plaintiff had been employed before incorporation to solicit advertisements for the company, and after the charter was granted the company, knowing that the engagement had been for the term of a year, continued to make use of the plaintiff's services and to make him payments on account as required by the contract. The plaintiff was discharged without cause within the year.

¹ 51 N. W. 216 (Minn. 1892).

The Court held that the jury were justified in finding that the corporation had adopted the contract, explaining that by adoption was to be understood the making of a new contract of the date of the adoption, and the plaintiff was awarded damages for breach of contract.

Such a result could not be reached except upon the hypothesis that the implied contract created by the act of the company was of the same terms as that made by the promoters, and if so, included an undertaking to pay for services rendered before incorporation, as well as for those rendered afterwards, and to continue to employ the plaintiff during the term of one year. See also ¹

§ 2. *A limitation of the rule.*

In *Weatherford R. R. v. Granger*,² the action was brought upon account for services rendered before organization in procuring a bonus for the company, and also for services rendered subsequent thereto, as attorney. There was a judgment for the plaintiff for the whole amount. On appeal the Court decided that there could be no recovery for the services rendered prior to organization, though stating that "the evidence was sufficient to sustain a recovery by plaintiff for the value of his services rendered *after* the corporation was created." As the Court below had failed to find separately the reasonable worth of such services, the entire judgment was reversed.

Here there was no single contract regulating the terms upon which the plaintiff's services were rendered, and in fact there had been no agreement as to the compensation to be charged. A jury would not have been warranted in finding that because the company knowingly accepted the benefits rendered after incorporation it had thereby intended to promise payment for those rendered prior thereto. The case suggests the limitation, therefore, that in order to charge the corporation for benefits conferred before incorporation, by reason of

¹ *Anapahoe Investment Co. v. Platt*, 39 P. 524 (Colo. 1895); *Grape Sugar Co. v. Small*, 40 Md. 395 (1874).

² 24 S. W. 795 (Texas, 1894).

its acceptance of benefits rendered after incorporation, the services must have been given in respect of the same contract or employment; of which the company must have had knowledge.

CHAPTER IX.

WHEN THE SERVICES HAVE BEEN RENDERED BEFORE INCORPORATION.

§ 1. *Elements of a true contract absent.*

The third class of cases to be discussed comprises those in which the contract between the promoter and the one now suing the corporation has been fully executed by the latter before the company came into existence.

Under such circumstances the elements of a true contract are wanting. Even if the corporation makes use of and enjoys the fruits of the promoter's contract, (since it came into existence with these advantages already conferred upon it), it is impossible to say that, judged by the standards of reasonable men, its conduct in so doing must be intended to imply a promise to pay for them.

The moment the corporate body became instinct with life (by no voluntary act of its own), it was vested with the benefit of all the services rendered in its formation, with all the goods which had accrued to it in its inchoate condition. It is therefore impossible to make use of the fiction of the continuing offer, or to predicate an acceptance of an offer whose terms have been fulfilled.

Even if the corporation should expressly promise to pay, it would seem that the promise could not be enforced against it on the ground of lack of consideration, for it is a familiar principle of contract law that a past consideration is insufficient to create a binding obligation.¹ The only exception to the rule last stated occurs where a prior request has been made, after which, if services are rendered, a subsequent promise to pay will be enforced. But here we have no

¹ Eastwood v. Kenyon, 11 Ad. & El. 438; Anson, p. 102.

request, for unless the promoters can be treated as agents (a view long since discarded), they could have no more authority to make a request in behalf of the corporation than to bind it absolutely by contract. Such a power would impute privity between the promoters and the corporation, which does not seem to exist.

It may, nevertheless, be manifestly equitable in a large number of cases to charge a corporation for the money, time and labor expended in the necessary and reasonable measures preliminary to its organization, and this in spite of the fact that on the contract under which the work was done or the money expended, the promoters are primarily liable. It is equitable not only because the party contracting relied on the corporation for his compensation for the services rendered to it (and not upon the promoter who may have been but a man of straw), but also on account of the promoter himself who would be held personally liable if the corporation did not pay, and who has acted *bona fide* in its behalf and to its advantage.

§ 2. *The obligation, if any exists, is quasi-contractual.*

Under such circumstances we have not the elements of a true contract, but such an equitable claim against the corporation as the law is accustomed to enforce under the designation of a contract implied in law or a quasi-contract. This claim is based on the theory that, did not the corporation pay for the services rendered, it would be unjustly enriched at the expense of the plaintiff; and that the law will not permit such unjust enrichment, is an established doctrine.¹

In speaking of the cases in which the doctrine is applied, Mr. Keener says:² "As the question to be determined is not the defendant's intention, but what in equity and good conscience the defendant ought to do, the liability while enforced in the action of assumpsit is plainly of a quasi-contractual and not contractual nature." The same writer says in a later

¹ Keener on Quasi-Contracts, p. 19.

² Quasi-Contracts, p. 20.

passage:¹ "Where the benefit for which the plaintiff seeks a recovery was conferred without the assent of the defendant there can of course be no contract, and unless the facts would establish a liability in tort, the plaintiff must proceed on the theory of quasi-contract."

If what has been said is true, the results which we may expect to find among the cases dealing with corporate liability for services rendered or benefits conferred *before* incorporation can be summed up as follows:

1. No true contract can be implied against the company.
2. There can be no express contract without a new consideration.
3. There may be a contract implied in law if the facts of the particular case would warrant the Court in finding that there would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. . . .
4. Unless the Court takes the view that it is unjust to the stockholders and against good policy to imply a contract in such case, under which view no recovery is possible.

§ 3. *No contract implied in fact.*

First, then, as to whether there can be a contract implied in fact where the services have been rendered before incorporation. The case of *Rockford R. R. Co. v. Sage*² was an assumption against the company for money paid and surveying done during the organization of the road. The Court said: "We are disposed to deny the right of recovery for such services and expenses upon any *implied promise resulting from the facts*, although the case cited by appellee's counsel of *Low v. The R. R. Co.*³ seems to sanction such a right of recovery." This decision has been expressly followed in the late Illinois cases.⁴

It is to be noted that *Low v. R. R. Co.*, "cited by appellee's

¹ *Quasi-Contracts*, p. 24.

² 63 Ill. 388 (1872).

³ 45 N. H. 373 (1864).

⁴ *Western Screw Co. v. Conoley*, 72 Ill. 531 (1874).

counsel," treated of a contract implied in law,¹ and is not in conflict with this opinion, in that respect, as was supposed by the Court. It did not decide that a true contract could be implied under such circumstances.²

In *R. R. Co. v. Ketchum*,³ the appellee had rendered services in the formation of the road, and in acknowledgment thereof the company when formed had voted him a free pass. This they subsequently revoked, and he continued to ride in the company's cars, refusing to pay on the ground that the pass had been given in return for his services, and constituted an irrevocable contract. The determination of the question, whether such a contract had been made and whether there had been any consideration moving to the company on which to base it, was therefore necessary to the decision. Ellsworth, J., said: "We are aware that it is no uncommon practice for corporations to assume and pay these preliminary and antecedent charges after the company has been organized, but we do not see how the company, if it should object, could be compelled to pay them, and in some cases it would be most inequitable to require it. . . ." "It is soon enough for corporate bodies to enter into contracts encumbering their property when they are duly organized according to their charters, and have their chosen and impartial directors to conduct their business."

This case, while clearly deciding that no contract is created by implication from the circumstances, seems to go further and incline to the opinion that neither could there be a recovery on any grounds.

There are a number of cases which take this view, the reason of which will be discussed later,⁴ but for the present it is only necessary to say that all of them support the proposition here contended for (*i. e.*, that there can be no contract implied in fact when it appears merely that a corporation has been benefited by services rendered before complete organization), for

¹ See *infra*.

² See *infra*.

³ 27 Conn. 170 (1855).

⁴ See *infra*.

they hold that such circumstances give rise to no legal obligation whatsoever.¹

A contrary opinion, however, seems to have been entertained in some cases.

In *Paxton Cattle Co. v. Bank*,² the corporators having a preliminary organization, bought a ranch and gave a note therefor purporting to be a corporate obligation, and upon which suit is now brought. The Court said: "The company through its officers and manager has retained the possession of the property in Chase County, both real and personal, for which the said note was given. This, under the authority of the foregoing cases (*Low v. R. R. Co.* and *Bell's Gap v. Christy*),³ is the turning point in the case, and I think the conclusion is inevitable, granting the entire want of power on the part of the officers and promoters of the corporation to act as such at the date of the note, that the retaining possession of the consideration by the corporation after its organization is a ratification of the contract with all of its terms and obligations."

The meaning of the Court is by no means clear in this decision, but it must be taken to intend one of two things. In referring to *Low v. R. R. Co.*, the Court had in mind a case in which it was said that "the contract is implied by law," and in saying that the retention of the benefit was the turning point, the Court may have meant that a quasi-contractual obligation was thereby created.

In saying, however, that the retention of the consideration "is a ratification of the contract," the Court would seem to infer that a jury would be justified in finding that it was the intention of the corporation to adopt or ratify the contract. In other words they base the obligation with which they charge the company upon intention, and not upon an implica-

¹ *Weatherford R. R. Co. v. Granger*, 24 S. W. 795 (Texas, 1894); *Melhado v. Porto Alegre Co.*, L. R. 9 C. P. 503 (1874); *Western Screw Co. v. Cousley*, 72 Ill. 531 (1874); *Rockford R. R. Co. v. Sage*, 65 Ill. 308 (1872); *Franklin Fire Ins. Co. v. Hart*, 31 Md. 60 (1869); *Marchand v. Loan & Pledge Assn.*, 26 La. Ann. 389 (1874); *Abbott v. Hapgood*, 150 Mass. 248 (1889).

² 21 Neb. 621 (1887).

³ *Infra*, § 6.

tion of law. If such was the thought of the Court, it is respectfully submitted that it is not in conformity with the authorities already considered, nor does it rest on sound principle.¹

§ 4. *An express promise not enforceable without a new consideration.*

The second conclusion which seemed probable, according to the discussion in the earlier part of this chapter, was that even if there should be an express promise on the part of the corporation to pay for the services rendered before its incorporation, such promise could not be enforced except on the basis of a new consideration; the benefit being past.

In *Melhado v. Porto Alegre R. R. Co.*,² the declaration counted for a breach of contract, and set forth that plaintiff had at the instance of the promoters of the company expended £2000 in necessary preliminary expenses. That the articles of association provided for the payment of all such expenses (if the directors should subsequently approve of them), and that the directors of the company had expressly ratified his expenditures.

Coleridge, J., refused to allow a recovery in spite of the formal action of the board of directors after the company was formed; thus denying that a binding contract had been created.

In *Empress Engineering Co.*,³ the board of directors after incorporation passed a resolution "that the agreement of purchase be ratified." Jessel, M. R., however, refused to hold the corporation bound by the action of the board.⁴

The contrary conclusion, however, has been suggested in some Illinois cases, though the point was not squarely decided. It was said in *Rockford R. R. Co. v. Sage*:⁵ "For services

¹ See, however, to the same effect, *Buffington v. Bardon*, 30 N. W. 776 (Wis. 1891).

² L. R. 9 C. P. 303 (1874).

³ 16 Ch. Div. 125. (1880).

⁴ See also *Abbott v. Hapgood*, 150 Mass. 248 (1889).

⁵ 65 Ill. 388 (1872).

and expenses before the organization of the company which subsequently the company accepts and receives the benefit of and promises to pay for, we will not say a party might not recover in virtue of such express promise;" but none such appeared in the case.

Following this suggestion, the dictum was repeated in *Western Screw Co. v. Cousley*,¹ where it was said: "This Court has decided that a corporation, after its organization, is not liable for the payment of debts contracted previously thereto, at least, without an express promise to pay them after acceptance and receipt of the benefit of that for which they were incurred."

As before said, the point was not necessary to either of these decisions, nor does it seem to have been duly considered or the objections thereto brought forward, so that the suggestion may safely be ignored, and as far as these cases are concerned, the rule stands as stated, *i. e.*, that even an express promise to pay for services rendered before incorporation does not bind the company without a new consideration.

Rather more difficulty, however, is occasioned by the case of *Stanton v. N. Y. & Eastern R. R. Co.*² The case was this: There having been a preliminary organization of the company, the plaintiff had entered into a contract with the *pro tempore* directors, agreeing to purchase the rights of way necessary for the road, according to certain stipulations. He did so. After organization the company passed a resolution that "the foregoing contract is ratified and declared to be a binding contract upon the parties." But the road failed and could not pay. The receiver appointed disallows the claim, and the plaintiff appeals from his report, which the lower Court had accepted. The Court said: "The corporation, by its ratification of the contract previously made by its promoters, became liable for everything that had been done pursuant to it. . . . The directors acted with full knowledge of all the facts and with such knowledge they ratified the contract. . . . Ratification relates back to the execution of the contract and renders it

¹ 72 Ill. 531 (1874).

² 59 Conn. 272 (1890).

obligatory from the outset. By the nature of the act, the party ratifying becomes a party to the contract and is on the one hand entitled to all its benefits and on the other is bound by its terms." The lower Court was reversed and the Court indicated that the plaintiff was entitled to recover for his time, money and labor expended; and damages for breach of the contract.

This decision is to be explained on the ground that the Court was clearly of opinion that in such cases the technical doctrine of ratification is applicable. However much the soundness of this view may be questioned,¹ it may be taken as settled that, wherever this doctrine of ratification is employed, no new consideration is needed to make the promise binding, for no new contract is made. As was said by Sharswood, J., in *Negley v. Lindsay*,² in reference to the doctrine of ratification: "The party confirming becomes a party to the contract, he that was not bound becomes bound by it; he accepts the consideration of the contract as a sufficient consideration for adopting it and usually this is quite enough to support the ratification."

In all those cases, therefore, where the technical doctrine of ratification is made use of or in which the Court says that there may be an actual adoption of the original contract, there being no new contract made, the corporation may be bound either expressly or impliedly without a new consideration.

But for this reason the cases are not authority against the general proposition that the company may not bind itself for benefits antecedent to incorporation, without a new consideration.

§ 5. *The doctrine of quasi-contract.*

We now come to consider the cases in which it is held that the law will impose an obligation to pay, where the corporation has been benefited unjustly at the expense of the plaintiff.

As has been said, the basis of this quasi-contractual obligation lies in the *injustice* of the defendant's enrichment at the

¹ See ante.

² 67 Pa. 218.

expense of the plaintiff. As to what constitutes "injustice," no rules of law can be laid down. Its presence or absence in any case must be determined by the circumstances of the particular transaction, viewed with reference to that standard of fairness and "good conscience" existing in the mind of the average reasonable man.

The position in which a corporation finds itself when confronted with a claim for services rendered before incorporation has this peculiarity. Not only were the services rendered without its request, but it never had an opportunity to refuse to accept them, and what is more it cannot return them. Under such circumstances, if the law is to impose an obligation upon the corporation to compensate the plaintiff, the most rudimentary conceptions of justice would dictate that the services or benefits, for which the claim is brought, must have been necessary to the formation of the company, and reasonable in view of the purposes for which it was to be created. Were either of these elements absent, the company would be compelled to pay for that for which it neither sought nor was in need.

Again, the services must have been of value to the corporation; for no matter how strenuously the plaintiff has labored or how much time and money he has expended, (if he has not succeeded in giving to the corporation that of which it stood in need), he has no equity to require payment therefor, since it is to be remembered that he has acted either at his own instance or at the instance of those who had no authority to bind the company.

It would also appeal to the common sense of justice that where the plaintiff has not contracted in reliance on the corporate credit, but depending upon the promise of the promoter, and he has received all that he contracted for, viz, a right of action against the said promoter, he should not be allowed to have more than his bargain, by holding the company liable.

In a general way, these are some of the thoughts which in any given case would effect the question of the justice or injustice of allowing a recovery against a corporation.¹

¹ Keener's *Quasi-Contracts*, Chaps. VI. and VII.

§ 6. *The doctrine as applied in the cases.*

Bearing these thoughts in mind, let us consider how far the doctrine of "unjust enrichment" has been recognized, by an examination of the cases.

*In re Empress Engineering Co.*¹ was a suit by an attorney for £63 for services rendered in procuring the charter of the defendant corporation. The articles of association provided for the payment of that sum, and the board of directors had expressly ratified the agreement after incorporation. The plaintiff brings his suit as upon an express promise.

Jessel, M. R., in denying a recovery, said: "There is another ground suggested, namely, that as the company has had the benefit of the registration they ought to pay for it. But the answer to that is, that that was not the claim brought forward. The claim brought forward was for an agreed sum of £63, and any order we may make will not prejudice that claim, which is merely for an amount due for services, the benefit of which has been taken by the company."

In *Low v. R. R. Co.*,² Bellows, J., said: "We are inclined to think, however, that it is no violation of settled principles to hold that a suit at law may be maintained to enforce the obligation to pay for services rendered in the manner described (under a contract with a promoter before incorporation), and of which the corporation after its organization has taken the benefit. If it were true that, at the time the services were rendered, the corporation had no capacity to make a contract, which is by no means clear after the charter has been accepted, still if the service were rendered for the corporation upon the promise of the corporators that they should be paid for by it when its organization was perfected, and after that the corporation had adopted the contract and received the benefit, we think that upon the maxim that a subsequent ratification is equivalent to a prior request, it may well be held that a promise to pay will be implied. Upon this principle a person may sue on a contract made in his name by one assuming to have authority

¹ L. R. 16 Ch. Div. 125 (1880).

² 45 N. H. 375 (1864).

but having none in fact. . . . *But the promise is implied by law* from the fact that the party, when it had capacity to contract, has taken its benefits and, therefore, must be deemed to have taken its burdens at the same time, and he is estopped to controvert it either by showing a want of capacity to make a contract or that none in fact was made." . . . "Indeed, it would be immaterial whether such services were rendered by a corporation or another, because the subsequent ratification is equivalent to an antecedent request; but we think that without such ratification, either express or implied, from taking the benefits of such services, the law would raise no such promise to pay, from the mere fact that the plaintiff was requested to render them by one of the original corporators or associates."

This amounts to a statement that, unless the corporation received benefit from the services, it would not be unjustly enriched at the expense of the plaintiff, and therefore no recovery could be had on that ground; and when the Court says that since the corporation would not be bound by the act of one of the promoters only, unless benefit had accrued to the corporation, it intimates that it would be bound in spite of the fact that no benefit accrued, if all the corporators had assumed to bind it.

That these two possibilities were before the mind of the court is apparent from the statement that it is not at all clear that the corporation is not sufficiently *in esse* to be bound by the acts of its officers after it has received a charter, though no organization has taken place. The thought is, first, that the corporation is *in esse* and may be bound; and, second, apart from that "if the services were rendered . . . and the corporation . . . received the benefit . . . a promise to pay will be implied."

In this case all the elements of a quasi-contract or a contract implied in law are present. Reasonable and necessary services had been rendered to the corporation, at the instigation of the promoters, of which the company had had the benefit, and for which they refused to pay. There was an unjust enrichment at the expense of the plaintiff. Indeed, the express language of the Court is to the effect that the contract so called is

implied by law. No doubt whatever could exist, were it not that the doctrine of ratification is dragged in and the statement made that the promise will be implied "upon the maxim that a subsequent ratification is equivalent to a prior request," and that "upon this principle a person may sue on a contract made in his name by one assuming to have authority but having none in fact." In other words, the Court makes use of the technical doctrine of ratification in order to charge the company, and must therefore have been of opinion that the intention of the corporation to be bound was necessary in order to create a contract implied in law. Now it is respectfully submitted not only that the doctrines of agency and of ratification have no connection whatever with the quasi-contractual obligation which the Court in fact imposed, but that the intention of the corporation to be bound is also entirely unnecessary in order that such obligation should be created. As said by Mr. Keener,¹ in relation to the term "contract implied in law," "It is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent."

It would seem, then, that while the Court in this case recognized that the obligation to be enforced against the defendant was quasi-contractual rather than contractual, it did not have clearly in mind the elements of such quasi-contractual obligation, and considered that there must be something in the nature of a ratification or an expression of willingness to be bound before the company could be charged. They also intimate that the mere passive retention of the benefits would be a sufficient circumstance from which a so-called ratification could be implied.

Now it is to be noted that if the facts were sufficient to give rise to an implication that the corporation had intended to pay, then a true contract would have existed between the parties, and it is believed that the law will never imply a contract

¹ *Quasi-Contracts*, p. 5.

where one already exists in fact,¹ for its primary aim is to give effect to the intention of the parties.

Again, if the obligation were dependent upon an implication from the facts, it is submitted that the Court erred in considering that, from a mere passive retention of the benefits, it could be inferred, as a matter of fact, that the corporation had promised to pay for them. The benefits referred to were services rendered in the formation of the company and the procuring of the charter. They were intangible and impossible of restitution. The corporation could not have refused to accept them since it came into being involuntarily, nor could it have refunded them, nor failed to use them without ceasing to exist. Under such circumstances it is submitted that a jury would have been utterly unjustified in finding any expression of intention on the part of the corporation. In all such cases, if the facts give rise to an equitable claim against the company, the remedy must be in quasi-contract, and if the Court shall determine in any case that there has been an unjust enrichment at the expense of the plaintiff, it is unnecessary for it to go further and attempt, as here, to find some expression of willingness to be bound.

This being the primary cause of confusion in the case, it is also to be remembered that the Court intimates, as an entirely distinct proposition, that a charter having been granted, the company was *in esse* and could be bound by the action of a majority of the corporators, as it could be by its regularly constituted officers.

The Pennsylvania case of *Bell's Gap R. R. Co. v. Christy*² was decided on the authority of this case. That was an assumpsit for services rendered and money expended in procuring the charter of the defendant company. Those present at a meeting before the charter, authorized plaintiff to do the work, and promised that he should be paid.

Paxson, C. J., said: "This lacks all the elements of a contract express or implied." In *Low v. R. R. Co.*, it was held

¹ Keener, p. 358.

² 79 Pa. 54 (1875).

that "where, after the charter and before the organization of a corporation, services are rendered which are necessary to complete that organization, and after it has been perfected the corporation elects to take the benefit of such services, knowing that they were rendered with the understanding that compensation was to be made, it will be held liable to pay for the services upon the ground that it must take the burden with the benefit; but that 'no promise to pay would be implied from the fact that such services were rendered at the request of any number of the corporators, less than a majority.'"

"It may very well be that where a number of persons not incorporated are yet informally associated together in the pursuit of a common object, and with the intent to procure a charter, in the furtherance of their design, they may authorize certain acts to be done by one or more of their number, with an understanding that compensation shall be made therefor by the company when fully formed. And if such acts are necessary to the organization and its objects, and are subsequently accepted by the company and the benefits thereof enjoyed by them, they must take such benefits *cum onere* and make compensation therefor. But the projectors or promoters of the enterprise within the meaning of the rule referred to, evidently must be a majority, at least, of such persons. Such minority can have no more authority to bind the association or corporation in its incipient or inchoate condition than they would have to bind it if fully organized." . . . "In the absence of any such authority and of any satisfactory proof that the result of the plaintiff's labor and expenditures was accepted and enjoyed by the corporation," . . . the defendant is not liable.

As we have seen the Court, in *Low v. R. R. Co.*, suggested two theories, on either of which that case might have been rested; the first, that the charter having been granted the corporation was *in esse* and could be bound by the acts of the corporators (in which case of course a majority must act); the second, that the company might become bound on a contract implied in law.

Now, the Court while purporting to quote from *Low v. R*

R. Co., uses language not to be found therein,¹ but which appears only in the syllabus of that case, and the statement as transcribed by the reporter is without any regard to its connection in the opinion. By adopting the words of the syllabus in *Low v. R. R. Co.*, the Court confuses the two grounds of action referred to, and while treating of the obligation as quasi-contractual, comes to the anomalous conclusion that not only must the corporation have been unjustly enriched, but the services must have been induced by a majority of the corporators before a recovery can be had against it. That the obligation is conceived of by the Court as resting in quasi-contract rather than contract is apparent from the following language: "And if such acts are necessary to the organization and its objects, and are subsequently accepted by the company and the benefits thereof enjoyed by them, they must take such benefits *cum onere* and make compensation therefor." Nothing is said about intention, and the Court wisely avoids the confusion of the suggested "ratification" of the *Low* case, and rests the duty of the corporation to pay, on the firm ground of the unjust enrichment which would occur in the event of its being permitted to refuse to compensate the plaintiff. Unfortunately, however, through the misinterpretation referred to, the conclusion reached, is undoubtedly, that the elements of a quasi-contract being present, the law will not enforce the obligation unless in addition the services were rendered at the request of a majority of the corporators. There is neither authority nor apparent reason to support such a rule.

This mistake led to confusion in the later Pennsylvania case of *Tift v. Bank*.² That was an assumpsit for services rendered after preliminary, but before final organization, in procuring subscriptions to stock at the request of a promoter. After organization was completed, Tift applied to the promoter (who was now president of the bank) for payment. The president promised that he should be paid, and subsequently laid the

¹ See portion of opinion in italics.

² 141 Pa. 590 (1891).

matter before the directors who made no objection but took no action on the matter. This evidence was refused admission as immaterial and judgment rendered for the defendant.

On appeal the Court said: "It is true it was said in *Bell's Gap R. R. Co. v. Christy*,¹ that where a number of persons not incorporated but associated for a common object, intending to procure a charter, authorized acts to be done in furtherance of their object by one of their number with the understanding that he should be compensated; if such acts were necessary to the organization and its objects, and are accepted by the corporation and the benefits enjoyed, they must be taken *cum onere* and compensated for. But it was also said that the promoters of the enterprise must be a majority. In the case in hand, the promise was made by a single promoter and there is no evidence of a subsequent ratification by the corporation." Judgment for defendant affirmed.

It has already been suggested that it would be a possible view to take of these cases, that in spite of the possibility that a corporation might be unjustly enriched at the expense of one who has rendered it material services before incorporation, a recovery should not be allowed in any event on the ground that the rights of shareholders who bought stock without knowledge of the services, would in some cases be impaired. If recovery is to be permitted at all, however, it would seem that in all justice it should be allowed in a case such as the one under discussion. No question was raised by the defendant as to the value, the reasonableness, or necessity of the services rendered. The plaintiff acted under a contract made on behalf of the company by the promoter chiefly interested in the scheme, and with the expectation that the company would pay him when it came into existence. The plaintiff has been injured and the defendant benefitted. The elements of the quasi-contractual obligation are all present; and yet, as we have seen, the Court denies a recovery on the ground that a prerequisite is still lacking in that all of the promoters did not join in requesting the services. The reason given for the

¹ 79 Pa. 34 (1875.)

result reached is, it is submitted, inadequate and based as has been shown on a misinterpretation of authority.

In a recent New York case,¹ the quasi-contractual nature of the remedy seems to be recognized though the opinion is too short to be very satisfactory.

The action was brought against the company for work done before incorporation at the request of a promoter and which, as the declaration alleged, went to the benefit of the company. The Court contented itself with saying: "The work was evidently done in contemplation of the corporate formation and it went to its benefit. Mr. Hazard, who ordered the work, seems to think he should not pay for it because the corporation got the benefit of it, and the corporation thinks it ought not to pay for the work because Hazard ordered it. This may sound well to all concerned except the plaintiffs who are entitled to their earnings." Judgment was rendered for the plaintiff. See also²

§ 7. The reasons urged against permitting a recovery in quasi-contract.

It has been frequently indicated throughout the foregoing discussion that a view prevails in certain jurisdictions that, as regards these services rendered antecedent to the formation of the company, the circumstances can give rise to no true contract based on the intention of the parties, nor will the law imply an obligation on the part of the company to compensate those who rendered them. These cases proceed upon the ground that it is unjust to stockholders to subject their property to the payment of claims in whose creation they took no part and whose legitimacy, therefore, they had no voice in determining.

The objection does not appear to be altogether well founded in this respect. Since the obligation rests on the doctrine of unjust enrichment, it only arises where the corporation (and therefore the stockholders) has received an actual benefit, for

¹ *Orier v. Hazard & Co.*, 13 N. Y. Supp. 583 (1891).

² *Little Rock, Etc., R. R. Co. v. Perry*, 37 Ark. 164 (1881).

which it is unjust that it should refuse to compensate the plaintiff. We have seen that, in the cases in which the doctrine has been employed, it has been uniformly held that the company was not *unjustly* enriched unless the benefits received were reasonable and necessary to the formation of the company. Now, under this rule, it would seem that it is no hardship to charge the stockholders for what was necessary to the corporate existence.

Another safeguard against undue recoveries against a corporation lies in the rule that the plaintiff must have relied upon the credit of the defendant; for if he acted upon some other consideration the benefit accruing to the corporation is purely incidental, and it is no injustice to refuse compensation therefor.¹

Again, the plaintiff is bound to take himself out of "the well established rule that no one has a right to force himself upon another as his creditor."² So, in any case in which the Court should be satisfied that the plaintiff had acted at his own instigation for the purpose of subsequently charging the company, it would seem that there could be no recovery. He must show that the services were rendered *bona fide* at the request of those interested in the formation of the corporation.³ And finally a recovery on the quasi-contractual obligation does not follow the terms of the original agreement between the plaintiff and the promoter, but is measured by the amount by which the defendant has been unjustly enriched.⁴

Under these circumstances it seems highly improbable that the rights of stockholders would be infringed in any considerable number of instances, and it is submitted that this would be a lesser evil than to refuse compensation, in any event, to those who have *bona fide* expended time, labor and money in the creation of a corporation.

¹ *Wilbur v. N. Y. Co.*, 12 N. Y. Supp. 456 (1891); *Little Rock R. R. Co. v. Perry*, 37 Ark. 164 (1881); *Weatherford v. Granger*, 24 S. W. 795 (Texas, 1894); *Keener*, pp. 350, 361.

² *Keener*, p. 341.

³ *Hall v. Vermont, Etc., R. R. Co.*, 28 Vt. 401 (1856); *Low v. R. R. Co.*, 45 N. H. 370 (1864).

⁴ *Keener*, Chap. VII.

§ 8. *The cases denying such a recovery.*

A considerable number of cases, however, take a contrary view. The leading case in America is *R. R. Co. v. Ketchum*,¹ which has already been considered at length. It will be recalled that the Court there used the following language in regard to allowing a recovery for expenses antecedent to incorporation. "This would be a breach of faith towards honest and unsuspecting stockholders who pay the charter price for their stock and expect to take it clear of all incumbrances. The getters-up of projects to be carried by such means may well be supposed, as is generally the fact, to be influenced by a view to their own special benefits, for certainly they do not act in behalf of the corporation itself. . . . It is soon enough for corporate bodies to enter into contracts incumbering their property when they are duly organized according to their charters and have their chosen and impartial directors to conduct their business."

Though the language of the Court is sufficiently broad to include all antecedent expenses, it was not necessary to the decision of the case, for the evidence was not clear that the services had been rendered with the primary intention of benefitting the intended corporation. In such a case the benefit is merely incidental, and falls within the rule that the law will not imply a promise to pay for incidental benefits conferred by one acting primarily upon some other consideration.

The same thought appears in *Rockford R. R. Co. v. Sage*,² where the Court says, "A right of recovery against a corporation for anything done before it had a proper existence does not appear to rest on any very satisfactory principle. It appears more reasonable to hold any services performed or expenses incurred prior to organization to have been gratuitous, in view of the general good or private benefit expected to result from the object of the corporation," and the decision is rested on the case above cited.

¹ 27 Conn. 170 (1858).

² 65 Ill. 388 (1872).

The English authority on the subject is *Melhado v. Porto Allegre Co.*¹ The plaintiff declared for breach of contract in the sum of £2000 expended by him in necessary preliminary steps in the formation of the company. The articles of association directed the company to pay the same.

Coleridge, C. J., after explaining that the doctrine of ratification was inapplicable, said: "Then it was suggested that, by taking advantage of their work and expenditures and coming into existence through them, the company gave rise to an implied contract to remunerate them. It seems to me that the defendants' counsel gave the right answer to this suggestion when he said that, if that were so, promoters might in all cases sue the company for expenses of promotion. I apprehend that all the decisions on this subject show that they cannot do so."

It has been attempted to be shown that the result feared by the learned judge, is not one to be dreaded from an application of the doctrine of quasi-contract to these cases. The law does not imply the promise *eo instanti* a plaintiff shows that he has conferred a benefit upon the defendant company, but he must first show that the company has been *unjustly* enriched at his expense. It is only when there is a real equity against the company that the obligation can be enforced, and in such a case the reasoning of the Court would seem inadequate.

One of the latest of the American decisions upon this point, and a case in which the whole subject of corporate liability on account of the acts of promoters is carefully discussed, is *Weatherford, M. W. & M. R. R. Co. v. Granger*,² decided by the Supreme Court of Texas in 1894.

A preliminary organization of the railroad company having taken place, the then officers promised that if a bonus should be raised by subscription the road should run between certain towns. One Anderson, the chief promoter of the scheme, was commissioned by the members of the organization to raise the bonus, and for his services in so doing he was promised \$1000.

¹ L. R. 9 C. P. 503 (1874).

² 24 S. W. 795.

Anderson, on his own authority, promised the plaintiff that if he would assist in procuring subscriptions to the bonus, the company would pay him. The bonus was raised, through the joint efforts of the plaintiff and Anderson, and the company was formed. The plaintiff now sues the company for recompense, for his services which the company had refused on the ground that its only contract was with Anderson. The plaintiff had also rendered services as attorney.

Gaines, J., held: "Now, when it is said that when a corporation accepts the benefit of a contract made by its promoters, it takes it *cum onere*; it is important to understand distinctly what is meant. There is, so far as this matter is concerned, a radical difference between a promise made on behalf of the future corporation in the contract itself, the benefits of which the corporation has accepted, and the promise in a previous contract to pay for services in procuring the latter to be made. This is well illustrated by the facts of the present case. Here a proposition was made on behalf of the company by its promoters, that if a bonus should be subscribed and paid to it, it would build its road between certain points and would carry coal at a certain stipulated rate. By accepting the bonus the company became bound to fulfil the stipulations of the contract. That was the burden which it took with the benefit of the agreement. But it also appears that one of the promoters promised the plaintiff that if he would assist in procuring subscribers to the bonus, the company would pay him for his services. This was no part of the contract, the benefits of which were taken by the defendant. The benefits of a contract are the advantages which result to either party from a performance by the other, and in like manner its burdens are such as its terms impose. A more accurate manner of stating the nature of the plaintiff's demand is, to say, that the defendant has accepted the benefit of the plaintiff's services and should pay for them. It is true in one sense that the company has had the benefit of plaintiff's services, and it is equally true that it would have had the benefit if the services had been rendered under an employment by the subscribers to the bonus; and yet in the latter case it could not be claimed

that the company would be liable for such services unless payment for them by the company were made one of the terms of the contract between the company and the subscribers. *In re Rotherham*, in the opinion of one of the justices, this language is used: 'It is said that Mr. Peace has an equity against the company because the company had the benefit of his labor. What does that mean? If I order a coat and receive it, I get the benefit of the labor of the cloth manufacturer, but does any one dream that I am under any liability to him? It is a mere fallacy to say that because a person gets the benefit of work done by somebody else he is liable to pay the person who did the work.' There is more doubt as to the plaintiff's right to recover for his legal services in advising as to the articles of incorporation and in correcting and preparing this paper. Such services are usually necessary, and it would seem that the corporation should pay for them. Such payment is frequently provided for in the act of incorporation or in the articles when the incorporation is effected under a general law. When such is the case, persons who take stock in the company are chargeable with notice that a liability for this purpose has already been created and it is proper for the corporation to discharge it. But in the absence of such provision in the statute or in the articles, it may be unjust to shareholders to charge the corporation with liabilities of which they had no actual knowledge at the time they accepted the shares. We, therefore, hold with some hesitation that claims for the necessary expenses of the organization under our statute should not be excepted from the general rule applicable to contracts made before the corporation has come into legal existence." See, also, to the same effect.¹

The opinion of the learned judge is divided into two parts. In the first, he treats of the plaintiff's services in raising the bonus; in the second, of the services rendered as attorney. As to both classes, the conclusion reached is that there can be no recovery, but the results are based upon different grounds.

¹ *Western Screw Co. v. Conaley*, 72 Ill. 531 (1874); *Marchand v. Loan*

1. As to the first the Court says: "A more accurate manner of stating the nature of the plaintiff's demand is to say that the defendant has accepted the benefit of the plaintiff's services and should pay for them. It is true, in one sense, that the company has had the benefit of plaintiff's services and it is equally true that it would have had the benefit if the services had been rendered under an employment by the subscribers to the bonus." A clearer exposition of the nature of the quasi-contractual obligation could not be had. The Court acknowledges that the company has received a benefit at the hands of the plaintiff, but denies a recovery. Why? Is it not because there has been no unjust enrichment of the defendant? The services were, indeed, rendered at the instance of a promoter, and with the expectation that they were to be paid for by the corporation. But as far as the corporation is concerned, it has already paid for them under its contract with Anderson. In view of such payment to Anderson, the plaintiff's services were not necessary and the corporation is not in "equity and good conscience" bound to remunerate the plaintiff. There has been no "unjust" enrichment, and the Court is clearly right in refusing a recovery.

The same reason underlies those cases in which it is held that, if an owner of property incurs debts in improving it and then conveys to a corporation which he is instrumental in organizing, the company is not liable for the debts so incurred. The plaintiff urges that his money has gone to the benefit of the corporation and the law should create an obligation to see him paid; but the short answer is that the law is not called upon to make the company disgorge, for it has not been unjustly enriched.¹

2. As to the plaintiff's labors as attorney, though the elements of the quasi-contractual obligation are present, a recovery is refused on the distinct ground that otherwise the rights of shareholders would be infringed.

In so deciding, the Court undoubtedly followed eminent

¹ *Ruby Chief Mining Co. v. Gurley*, 29 P. 668 (Colo. 1892); *Little Rock R. R. Co. v. Perry*, 37 Ark. 164 (1881); *Paxton v. Bacon Mill Co.*, 2 Nev. 257 (1866).

authority, though, as has been suggested, the view might, perhaps, be entertained that since the shareholders are the real parties in interest, and since no recovery can be had, save where the corporation (and, therefore the shareholders themselves) has been unduly benefitted, it is no hardship upon the latter to allow the recovery.

CHAPTER X.

CONCLUSION.

It will be sufficient to say, in conclusion, that while there has been a very considerable difference of opinion among the Courts as to the grounds upon which a corporation is liable for benefits received under a promoter's contract *after* incorporation,¹ that this difference of theory has not led to any great divergence in the conclusions arrived at in the cases; for whatever the theory, the prerequisites to a recovery have been essentially the same in all Courts. The discussion given this question, therefore, must be justified rather as being in the interests of an exact use of legal terminology than as touching fundamental principles.

As regards the subject latterly considered, however, *i. e.*, as to the liability of a corporation for services rendered *before* incorporation, it has been seen that the decisions are squarely in conflict. Those denying a recovery have upon their side, perhaps, the weight of authority; while those permitting it have not applied uniformly and consistently² the principles of quasi-contract upon which it is contended such a recovery is based. It may be fairly said that both sides generally admit that if there can be a recovery under any circumstances, the foundation thereof must lie not in contract but in an obligation imposed by the law.

The thought of the writer has been that, in many instances it would be but just and right that the law should create a

¹ See Part II.

² See *Low v. R. R. Co.*, 45 N. H. 370 (1864); *Bell's Gap v. Christy*, 79 Pa. 34 (1875).

liability on the part of a corporation to pay for expenses preliminary to its organization; that the conflict of authority has, perhaps, arisen from a failure on the part of some of the courts to recognize the grounds upon which such an obligation rests; and I have, therefore, made free use of the thoughts contained in Mr. Keener's work on Quasi-Contracts, wherein the bases of this obligation are so ably considered.

Malcolm Lloyd, Jr.

INTERNATIONAL LAW.

There is no subject in the range of judicial science possessing such intrinsic claims to attention as that of international law. The foundations on which it rests—the sanctions by which it is enforced—the difficulty of the questions involved—the magnitude of the interests concerned—all and each of these considerations affords matter for curious and most interesting contemplation. The great nations of antiquity, which have contributed most to the civilization of modern Europe, have given least to this branch of civilization. If we look at the history of the Jews we find a total absence of the sense of duty in relation to other nations. Nearly all our knowledge of international law among ancient States is derived from their intercourse with the Jews, and with the Greeks, and Romans, more particularly with the latter. Most of the rules were founded on religion. Treaties were sanctioned with solemn oaths, the violation of which it was believed would be followed by the vengeance of the gods. War between nations of the same race and religion was declared with sacred rites and ceremonies, but when once begun it was waged with little rule or check. The herald proclaimed its existence by devoting the enemy to the infernal gods. Ambassadors and heralds always possessed a sacred character.

The division of the Greek world into a large number of independent communities favored the existence of an Hellenic law of nations, presenting in many points—such as the recognition of common Hellenic customs, religious and political, and of the principle of a balance of power—a parallel to modern international law. They generally gave quarter, allowed the ransom of prisoners, respected trophies, and allowed truces for the burying of the dead; and they had a usage bearing a resemblance to the modern consular system. The *Jus Fœdæ* of the earlier Roman law, regulating the formal intercourse between Rome and other nations, is

indeed the germ of what might have been a system of pure international law. But the rise of the Roman republic to the mastery of the world rendered such a thing as international law unnecessary and impossible. The reason for this is clear; international law rests upon two great maxims—that nations are mutually independent and that they are equal—but the history of Rome shows the exaggerated notions of Roman superiority, and the constant aim of the Roman people to destroy all other power and independence but their own. The chronic state of war, and the lust of conquest, which mark the history of Rome, were unfavorable to the growth of anything like that friendly union among States which is productive not only of reciprocal rights and obligations, but of reciprocal esteem. When we look at the fierce spirit of conquest amongst the Romans, and their barbarous international customs, such as is to be found in their haughty triumphs, in their gladiatorial shows, when wretched captives were “butchered to make a Roman holiday;” in the barbarous doctrine of law maintained even in Justinian’s time, that prisoners of war became slaves *jure gentium*, and that the consequence of captivity, even in time of peace, was slavery and loss of property; it can scarcely be said that modern international law is derived from ancient Rome. In the midst of these barbarous customs, there were, however, some redeeming features, such, for instance, as the allowing prisoners of war to purchase their freedom, and selling them only when unransomed, and from this practice, in the course of time, grew up the more humane custom of allowing the exchange of prisoners. Captives were not maltreated by the Romans, as the Athenians were at Syracuse by Greek conquerors, with the exception of kings and generals, who were, at least in Cicero’s day, butchered without mercy, after having been led in triumph through the city. Nor did the Romans entirely deprive the inhabitants of the conquered country of their lands; they allowed them to retain some small portion, on the condition that they paid rent for the same as tenants (*coloni*). But of a system of law which conceived of States as the subjects of rights and duties, as members of a community of nations, the pol-

ished and elegant jurisprudence of antiquity furnishes hardly a trace. In the same consummate code which still rules the most complex relations of life with a wisdom and justice, which modern culture has hardly been able to improve, stand side by side the high morality of a completed system of equity jurisprudence, and the savage doctrine that strangers are enemies, and that with enemies war is eternal. Amid such relations of States, there was no place for law. But when from the Christian doctrine of the brotherhood of man, the inevitable corollary of the brotherhood of nations was deduced, a body of law to govern this new community followed as an inevitable consequence. It grew slowly at first, for the age was technical, and dynastic interests long absorbed the cares of statesmen. Scholists and commentators denied that there could be a law of nations, for where was the superior authority to enact it? It was difficult for lawyers to conceive of law without a tribunal to enforce it. Princes refused to admit that any rules restrained the prerogatives for which they claimed divine origin. Mr. Ward (in his "History of the Law of Nations," vol. I. 322-328) enumerates five institutions existing about the period of the 11th century which made a deep impression upon Europe, and contributed in a very essential degree to improve the Law of Nations. These institutions were the feudal system, the concurrence of Europe in one form of religious worship and government, the establishment of chivalry, the negotiations and treaties forming the conventional law of Europe, and the settlement of a scale of political rank and precedence.

The spirit of chivalry encouraged high sentiments of honor and fidelity, and gave a moral sanction to the observance of treaties, and rendered fraud and unfair advantage over a rival unworthy of the true knight; it threw a lustre over the defence of the weak and unprotected; and it cultivated humane feelings towards each other among the rulers of society. Chivalry dictated humane treatment to the vanquished and courtesy to enemies. The influence of Christianity was very efficient towards the introduction of a better and more enlightened sense of right and justice among the governments

of Europe. Indeed, as Laurent says, the idea of a system of international law is due to Christianity. For how could there be any legal tie between man as an individual and men as people and nations until the consciousness of a common nature was acknowledged; until the gulf which separated the free man from the slave was filled up; until the contempt for or hatred of the stranger as barbarian or enemy was removed; until man's nature was changed, and war ceased to be regarded as a glorious pastime, or an ordinary occupation, and until an equitable system was substituted for one huge overgrown empire ever striving to draw all neighbors within its grasp and to maintain unlimited rule? (*Histoire du droit des gens*. Laurent, Tome iv. livre iii. ch. 1). Christian nations were bound together by a sense of common duty and interest in respect to the rest of mankind. The history of Europe, during the early periods of modern history, contains many cases to show the authority of the Church over turbulent princes and fierce warriors, checking violence and introducing a system of morals which inculcated peace, moderation and justice. The government of the Church by a monarch, who gradually gained great political power, the presence in Europe of an ultimate interpreter in questions relating to religion and morals, no doubt did a great amount of good as well as a great amount of harm. All important questions of politics had some sort of bearing on religion, which could bring them up for examination and settlement before the Roman Pontiff; and the very vagueness of the theory of papal interference aided its success on favorable occasions. Innocent III. said: "*Nos secundum plenitudinem potestatis de jure possumus supra jus dispensare.*" (C. 4 x. *De concessione prebenda*.) The oath of fealty was the moral ligament of society, but the Roman Pontiffs claimed the right to release vassals from their oaths of allegiance on the ground that kings and princes who were disobedient to the Church might be excommunicated, and that excommunicated persons ought not to rule over Christians. The popes acted as arbitrators between prince and prince, and between prince and people; they protected the weak against the strong, and right against might. The prin-

ciple grew up that disputes between nations should be decided according to law and Christian morality, and that war, when inevitable, should be conducted according to recognized rules laid down in the interest of humanity.

The influence of treaties, conventions, and commercial associations helped greatly to form the modern code of public law. The rights of commerce began to be regarded as under the protection of the Law of Nations. Efforts were made, upon the revival of commerce, to suppress piracy and protect shipwrecked property. Pillage had become an inveterate moral pestilence. Papal bulls and the excommunication of the Church were not powerful enough to put an end to these evils. Conventions and treaties between sovereigns, on the revival of commerce, contributed gradually to suppress this criminal practice by rendering the regulations on the subject a part of the Law of Nations. But it was reserved, says Valen, to the ordinances of Louis XIV. to finally extinguish this species of piracy by declaring that shipwrecked persons and property were placed under the special protection of the crown, and the punishment of death, without hope of pardon, was pronounced against the guilty.

Such was the Law of Nations when Grotius lived (A. D. 1625). It had been reduced to some degree of science and civility by the influence of Christianity, the study of Roman law, and the spirit of commerce. But it was still in a state of great disorder, and its principles were little known and less observed. It consisted of a collection of undigested precedents, without order or authority. The work of Grotius, *De Jure Belli et Pacis*, published in 1624, definitely laid down the foundation of the science of international law, and his work was shaped in imitation of the institutional treatises of Roman law. The object of Grotius was to correct the false theories and pernicious maxims, which then existed, by showing a community of sentiment among the wise and learned of all nations and ages in favor of the natural law of morality. He also endeavored to show that justice was of perpetual obligation and essential to the well-being of every society, and that the great commonwealth of nations stood in need of law, the

observance of faith, and the practice of justice. His idea was to digest in one systematic code the principles of public right, and to supply authorities for almost every case in the conduct of nations. Thus he had the honor of reducing the Law of Nations to a system, and of producing a work which has been resorted to as the standard of authority in every succeeding age. He is, therefore, justly entitled to be called the father of the Law of Nations.

The general desire of mankind that the mutual conduct of nations should be governed, or at least directed, by recognized rules—that there should be some principles to be invoked by the weak, and yielded to without humiliation by the powerful—has produced, indeed, a literature in international jurisprudence exceeding in magnitude that which has been employed on any other branch of the moral sciences. Many of the writers have been remarkable for sagacity, and almost all have been men of diligence and learning, and devoted to the subject of their labors. By the term international law, is meant that collection of rules, customary, conventional and judicial, which are accepted as binding *inter se* by the civilized nations of the world. International law lays down rules to be observed in the mutual dealings of nations, which are at peace with each other, and of nations which are at war with each other; and it determines the rights and duties of belligerent and neutral nations. But the rules of international law which relate to war are more voluminous and certain than those which govern nations in time of peace. International law as a whole is capable of being very differently interpreted according to the point of view from which it is regarded, and its rules vary infinitely in point of certainty and acceptance. By some jurists it is considered improper to speak of these rules as laws; they are merely moral principles, as they are destitute of the sanctioning force which is the distinguishing quality of law proper. Whilst other jurists derive its principles from some transcendental source, such as nature, the Divine will, reason, etc., and these do not hesitate to attribute to its rules an intrinsic authority over all the nations of the world. According to this theory, the usage of nations is evidence of, but not

the origin, of the law. It merely expresses the consent of nations to things which are naturally—that is, by the law of God—binding upon them. There is, however, no legislative or judicial authority recognized by all the nations of the world that regulates the reciprocal relations of States, and consequently no express laws, except those which result from the conventions which States may make with one another. So that, however long established or useful any or all of these rules may be, there is but one real remedy for their infraction, and that remedy is the sword. True, public opinion may be and often is appealed to with considerable force, in cases of violation of international morality, yet such appeal is not always attended with success, and at the best it affords but a precarious defence against the acts of powerful nations. The foundation, therefore, upon which international law rests is the consent of nations.

The rules of human conduct to which the word "Law" is applied are thus classified by Locke, (1) The Divine law ; (2) The Civil law ; and (3) The Law of Opinion or Reputation. The law of nations may be divided into, firstly, the rules of international conduct which we believe to be commanded by the Deity, and which may be called the Divine law of nations, the natural law of nations, or more concisely, international morality ; and, secondly, the rules of conduct which are dictated or permitted by the public opinion of nations, and which may be called the human, the actual, the secured, or the positive law of nations. To avoid the confusion incident to the use of one word to express rules of conduct often different, both in themselves, and in their sources, it will be as well to style the Divine or natural law of nations, *International Morality* ; and confine the term *International Law* to the rules of conduct, whether consistent or not with international morality, which are sanctioned by the public opinion of nations. A passage in the work of Hobbes' *De Cive*, appears, from the constant reference to it by subsequent writers, to have had an extensive influence on the theory of international morality. In that passage Hobbes affirms, that organized nations assume the personal characters of men, and con-

sequently that there is no difference between the moral rules which ought to be observed by individuals. (*Lex naturalis dividi potest in naturalem hominum et civitatum, qua vulgo jus gentium appellatur. Præcepta utriusque eadem sunt—quia civitates semel institutæ induunt proprietates hominum personales.*—*Imperium* cap. xiv. sect 4). In fact, however, the analogy between nations and individuals is so imperfect, that we are seldom warranted in inferring as to the one, conclusions which have been established as to the other. In the first place, the principal rules of morality among men relate to what have been called imperfect obligations, and direct what is to be done, not what is to be avoided. The negative precept, not to injure, is merged, in the positive precept, to do good. But in the existing state of human improvement, almost all the precepts of international morality are negative. A time may come when it may be useful to inculcate international benevolence; but if we confine our efforts to attainable objects, we must be satisfied for the present with endeavoring to enforce international justice. To suppose that a nation, such as nations now are, unless with a view to enrich a customer, or to strengthen an ally, or to weaken an enemy, or to raise a barrier against a rival, or for some other selfish purpose, will actively strive to increase the power or wealth of another, is a vision in which no practical politician can indulge. Instances may, indeed, be pointed out in which a people, too weak to excite jealousy, has received disinterested assistance. But such instances are very rare. Great must be the progress of civilization, before the most sanguine international moralist can hope to do more than to diminish fraud and violence, to preserve the weak from treachery and oppression, and to prevent the strong from tearing one another to pieces.

A further difference between the morality of nations and the morality of individuals, arises from the necessity imposed on the former of self-protection. An individual is protected by the law. His cottage is not endangered by the palace which arises in its vicinity. There is, therefore, no need for him to take measures to diminish the power of his neighbors. But one of the best established principles of international morality

declares, that, under certain circumstances, it is not only the right, but the duty of the general body of nations to prevent anyone from acquiring a preponderance of force dangerous to all the others.

Again, it is now an admitted doctrine that between individuals a contract obtained by violence is not binding. But all Europe was shocked at the immorality of the statesman who ventured to proclaim that the treaties of 1815 were not binding on France, having been wrung from her when her armies had been defeated and her fortresses captured, and while her capital was in the possession of the enemy. It is for the welfare of society that agreements entered into by an individual while under duress, should be void. On the other hand, the welfare of society requires that engagements entered into by a nation under duress should be held binding; for if they were not, wars would terminate only by the utter subjugation and ruin of the weaker party. If the Allies had believed that their treaties with France were merely waste paper, they must have destroyed her fortresses and partitioned her territory. They ventured to leave her powerful, only because they thought they could rely on her engagements.

And, lastly, there is a marked difference in the force of the sanctions which tend to restrain immorality among men, and those which tend to restrain it among nations. These sanctions are moral or physical. The physical sanction is the fear of injury to person or to property. The moral sanction is the fear of punishment in a future world, or the loss of honor, of reputation, or self-esteem in this. But the attempt to bind nations by mere moral sanctions, is to fetter giants with cobwebs. To the greatest of human restraints, the fear of a hereafter, they are insensible. Again, nations, are not restrained by fear of the loss of honor; for honor, in the sense in which that word is applied to individuals, does not apply to them. Among educated Europeans, these imputations are in men cowardice and falsehood; and in women unchastity. But as a nation cannot be excluded from the society of other nations, a nation cannot lose its honor in the sense in which honor is lost by an individual. Never has the foreign policy of France

been more rapacious, more faithless, or more cruel, than during the reign of Louis XIV. For half a century she habitually maintained a conduct, a single instance of which would have excluded an individual from the society of his equals. At no time was France more admired, and even courted. What are often called injuries to the honor of a nation are injuries to its vanity. The qualities of which nations are most vain, are force and boldness. They know that, so far as they are supposed to possess these qualities, they are themselves unlikely to be injured, and may injure others with impunity. What they most fear, therefore, is betraying timidity, which is an index and cause of weakness. But timidity, which excludes a man from society, makes a nation only the more acceptable. The fear of loss of reputation is, indeed, a restraint; and among the nations that desire to be respected for justice, a considerable one. But such nations are few. Strength and courage—or as it is usually termed spirit—not integrity and moderation, are the qualities for which most nations desire to be admired. If they can succeed in inspiring fear, they are indifferent to hatred. It appears, therefore, that the fear of physical evil, the fear of injury to the persons or to the properties of the members of the community, is the principal restraint on the conduct of nations. As a protection to the weak, of course, it is trifling; and the rights of weak nations, therefore, unless they acquire the advantages of strength by confederacy, are always disregarded by the strong. But when a nation perceives a probability that it will be resisted, and a possibility that it may fail, the check is powerful—more powerful, in most cases than that imposed by the physical sanction on individuals. When an individual proposes to break the municipal law, he expects to escape detection, and he generally knows the amount of evil which, if he be detected, will follow. A nation, on the other hand, never escapes detection, and never can estimate the amount of suffering which it may incur. The law of nations appears at first sight to resemble those of Draco. It seems to have only one punishment for every offence; but that punishment may vary, from a passing inconvenience to

the utmost evil that man can endure from man. It may be confined to a temporary financial and commercial derangement, or it may extend to the destruction of the wealth, the institutions, the independence, the education, and even the religion of the country. The fear of these dangers generally prevents deliberate breaches of international law between great nations.

In the present state of the world, countries of equal, or nearly equal strength are desirous of mutual peace. War has become a far more expensive and far more dangerous game than it was two or even one hundred years ago. Both nations and sovereigns feel that its risks more than balance the chances of gain. While the law to which each party appeals is in its present vague and imperfect state; and while a knowledge of its rules, as far as they may be considered as established, is so little diffused, it is impossible to prevent the frequent recurrence of international disputes and very difficult to adjust them. But as it seldom happens that a nation intentionally violates what it believes to be that law—except, indeed, in the case of a neighbor too weak to resist—it follows that if the rules of international law were full, clear, and well-known, national disputes would be rare and brief. If it be important that municipal law should be clear and well-known, in order to prevent the inconvenience of private litigation, how much more important is it that the rules of international law should be ascertained and studied in order to prevent war between civilized nations. It is an admitted principle in international law, that all nations are to be treated as equal; that all are entitled to similar rights, and to a similar independence, whatever be their power. But hardly a shadow of this equality is to be found in practice. In practice, the treatment which nations receive depends on their force: the strong dictate, the weak submit, and those whose power is nearly balanced, negotiate.

Possibly there is no point on which the Law of Nations as laid down by Grotius, differs more from that which is now recognized, than as to the treatment of criminal refugees. Grotius maintains, that a nation is strictly bound either to

punish or to give them up, but he admits that the injured nation seldom exacts the performance of this duty, except in the cases of persons accused of political offences, or of atrocious crimes. But it is now admitted, first, that no nation can lawfully punish or even try offences committed by foreigners in a foreign territory; and, secondly, that the extradition of criminals for trial or punishment in the country where the crime was committed, is a matter of treaty, and can be required only to the extent and under the circumstances defined by the treaty; and, thirdly, that political offences are precisely those to which no such treaty ought to extend.

It is scarcely necessary to mention that, of all the countries of the world, England has by far the greatest interest in maintaining the independence of her mercantile flag in time of war, and the safety of the property afloat, whether under another flag or her own. England has almost as many merchant vessels trading to every part of the globe as all the other maritime States put together. Her own property *in transitu* on the ocean is enormous. She also carries a very large amount of merchandise for foreign owners. Her colonies are scattered over every part of the globe, and the colonial trade and navigation is carried on, like that of these islands, under the British flag. It is, therefore, of paramount importance to us that in the event of war, whether we are neutrals or belligerents, our commerce should be exposed to as little interruption and peril as possible. The modern policy of England is to maintain, as far as possible, a strict neutrality when war breaks out between foreign States, unless her own rights and interests are concerned or attacked. During the last forty years six wars have occurred in which British neutrality has been successfully maintained—the Franco-Austrian war of 1859, the Mexican war, the American civil war, the Danish war of 1864, the German war of 1866, and the Franco-German war of 1870. In each of these conflicts it would have been competent to the belligerent powers, but for the Declaration of Paris, if they had thought proper, to exercise the ancient belligerent rights,—to arm and commission privateers; to stop and search every British vessel on the seas; to take out of

them any enemy's property found on board; to intercept the service of our mail-packets all over the world in search for prohibited articles and correspondence, and to inflict on us as neutrals an incredible amount of loss and annoyance.

We have reached an epoch in which a spirit of moderation and a sentiment of equity begin in the elevated sphere of politics to prevail over the tendencies of an ancient routine, at once arbitrary and insolent, and over a culpable indifference to the causes that lead to wars and misfortunes. The grand epoch, which places the interests of humanity above those of policy, is the aim towards which every great intelligence turns in times like these with instinctive sympathy. States between which there exists a serious cause of disagreement, before having recourse to arms, should, as far as possible, submit their differences to the friendly offices of neutral powers.

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THE ADMINISTRATION OF JUSTICE IN JAPAN.

ADDENDA.

The article in our last four numbers, entitled "The Administration of Justice in Japan," by Professor John H. Wigmore, owing to his absence in Europe, was not submitted to him in proof before printing; and, since the date of its presentation to the Columbian Exposition Congress, events in Japan have made necessary some additional lines noting the recent changes in the international situation.

The chief purpose of the article was to demonstrate Japan's fitness for the abolition of the extra-territoriality imposed by the treaties of forty years ago and for the resumption of her judicial autonomy. Since the date of the paper this result has been substantially accomplished by the negotiation of new treaties with the great Occidental powers. England broke the path, just as the Chino-Japanese war opened, by a treaty signed July 16, 1894; the United States followed (but too late to gain the credit of priority in good deeds) on November 16, 1894; then successively Russia, Germany, Sweden-Norway, and Italy; in France the Senate now has a new treaty before it. Under all these treaties, consular jurisdiction is brought to an end on July 16, 1899, and judicial autonomy is then restored; the American treaty is to continue in force for twelve years from that date, with an option for either party of rescission after twelve month's notice; but of course the denunciation of the treaty would not restore extra-territorial consular jurisdiction, which is forever swept away.

The new Civil Code of Japan, described in the article in question, was to have gone into force January 1, 1893; but the Parliament postponed its operation for five years, mainly in order to bring its provisions of family law and inheritance into greater harmony with Japanese traditions. At present there are in force large portions of the revised Civil and Commercial Codes, as well as a revised Criminal Code. The entire system is expected to be in operation before July 17, 1899, the date for the extension of Japanese jurisdiction over foreigners.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

Assignment of Judgment, False Representation
The Supreme Court of New York has very properly decided (especially in view of the fact that the defendant was an attorney-at-law) that proofs that the plaintiff knew the nature and effect of an assignment of a judgment, does not meet the plaintiff's charge that he was induced to make said assignment to the defendant by reason of a false representation on the part of the latter, that if the plaintiff did not so do he would be sent to prison: *Dunn v. Wehle*, 46 N. Y. Suppl. 981.

Assignment for Benefit of Creditors
The Kansas Statute (§ 42, c. 6 Gen. Stat. 1889) provides that on the day of executing an assignment, a schedule of the liabilities of the assignor shall be filed with the clerk of the court, whose duty it becomes to notify the creditors. In *Goodin v. Newcomb*, 49 Pac. 821 (Kan.), the court was called upon to decide the validity of an assignment where the schedule was not filed until the following day, as against an attachment which issued just after the filing of the schedule: it was held that the assignment was completed by the filing of the schedule, although it was intimated that the attachment might have been given priority if there had been any evidence that the schedule was withheld for a fraudulent purpose.

Attorney, Scope of Authority
An attorney has, by virtue of his office, no authority to compromise his client's claim, or to satisfy his client's judgment, except upon payment in full. Hence, held that burden is on party who alleges that plaintiff's attorney accepted an acknowledgment of indebtedness by garnishee to debtor in payment of his writ of execution, to show that he had authority to do so: *Barr v. Roddy*, 49 Pac. (Ore.) 962.

Auction Sale, Validity
The question of the validity of an auction sale at which puffers are employed by the owner to bid up prices in his behalf, about which the courts of common law and of equity in England were so long a time at variance, has been recently passed upon by the Supreme Court of New York, that court holding that such sale operates as a fraud on the real bidders and is invalid: *Bowman v. McClenahan*, 46 N. Y. Suppl. 945.

A broker is entitled to his commission for the sale of real estate as soon as he has found a purchaser, regardless of whether his principal throws over the contract or not, but the broker may waive his right by continuing to act for the principal and selling it to another purchaser, when he is entitled to commission only on second sale: *DeFord v. Shepard*, 49 Pac. (Kan.) 795.

A form of notice sent by a common carrier to the consignee of certain goods, apprising the latter of the fact that the said goods had arrived at their destination, and bearing a request to return said notice when calling to pay charges, and a statement that all orders for the delivery of goods must give the number of the car and date of freight bill, is not evidence of title of said goods sufficient to justify a delivery to the party in whose hands the paper is found, without ascertaining that the delivery was being made to the consignee: *Sixshirmer v. New York Cent. & H. R. R. Co.*, 46 N. Y. Suppl. 887. (Supreme Court.)

Defendant acted as attorney for plaintiff and others in the adjustment of certain fire insurance. Plaintiff claimed a balance due her upon this account. Defence that this balance had been paid over to other parties, clients of defendant, with the plaintiff's consent. When asked to state their names defendant refused, on the ground that such payment was a confidential communication. It was decided when an attorney acts for several, a communication made by or to one of them in the presence or with the knowledge of the others is not a confidential communication, and hence defendant must answer the question: *Minard v. Stillman*, 49 Pac. (Ore.) 976.

The Supreme Court of New York has reiterated the rule that in the case of a contract consummated through written correspondence, the contract is made at the place where the letter containing the proposition is received and whence the assenting reply is forwarded, and that the contract is complete when the letter of acceptance is sent; and applying the rule to wagering contracts, has decreed a recovery under the New York Statute, (1 Rev. St., p. 663, §§ 15, 16,) of money transmitted by the plaintiff in New York to the defendant in Pittsburg, Pa., to be used by the latter in wagering contracts upon the rise and fall of prices on the

Chicago Board of Trade: *Zeltner v. Irwin*, 46 N. Y. Suppl. 852.

When in a contract for the sale of real estate the person named as vendee refuses to carry out the agreement unless performance, property not mentioned in the contract is conveyed to him, the vendor is relieved from performance, or tender of performance, as a prerequisite to recovering an amount named in the contract as liquidated damages: *Light-hall v. McGuire*, 46 N. Y. Suppl. 987. (Supreme Court.)

Where the seller of grain, prior to the time of delivery, notifies the buyer that he will not deliver the property purchased; if, at any time between the notice of rescission and the time of delivery, the buyer might have bought in the market at or below the contract price, he can only recover nominal damages; but if, during that period, the market value is constantly greater than the contract price, the buyer need not purchase in the market at his peril, at the time when the value is lowest, nor, indeed, at all, but may recover from the defaulting seller the market value of the grain at the time and place of delivery, less the contract price: *York-Draper Mercantile Co. v. Lusk*, (Court of Appeals of Kansas,) 49 Pac. Rep. 788.

The rule that the defendant, in a suit for breach of contract, is not liable for speculative damages, does not extend so far as to permit him to escape all liability for the breach simply because his liability cannot be accurately determined in dollars and cents, and the jury may thus need to speculate somewhat as to the amount of damages suffered by the plaintiff: *Stowell v. Greenwich Ins. Co.*, 46 N. Y. Suppl. 802. (Supreme Court.)

The Supreme Court of New York, in *Williams v. Hay*, 46 N. Y. Suppl. 895, decided that it was not actionable deceit for

<p>Deceit. Guaranty of insolvent. Fact not disclosed</p>	<p>an insolvent to give a guarantee for the performance of a third person's contract, where he neither represents himself to be solvent nor discloses the fact of his insolvency.</p>
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This follows out the rule that an intent to defraud cannot be imputed to an insolvent, who contracts a debt knowing he is insolvent, but not disclosing the fact.

The Merchant Shipping Act of 1894 provides that, when a British seaman is discharged, the master shall furnish him passage home, or supply him with the means of reaching home, or else "deposit with the consular officer . . . such a sum of money as is by

<p>Discharged Seamen. Passage Home</p>	
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the officer . . . deemed sufficient to defray the expenses of his maintenance and passage home." The penalty for non-compliance is liability to a suit by the seaman for the expenses incurred. The Court of Appeal has decided (*Edwards v. Steel, Young & Co.*, 45 Weekly Rep. 689) that if the master deposits with the consular officer money for this purpose, that officer is arbitrator without appeal, and a seaman whose expenses exceed the amount thus deposited has no remedy.

Under the New York Statute alimony may be allowed or increased after divorce, provided the court serves the power in the decree of divorce: *Noble v. Noble*, 46 N. Y. Supp. 820. (Supreme Court.)

The Supreme Court of New York has laid down the rule that an election to decide the question of the issuance of municipal bonds, on which question only qualified property owners are by statute allowed to vote, is rendered void by the admission of unqualified votes to a number equal to the majority by which the proposition was carried: *Scott v. Twombly*, 46 N. Y. Suppl. 1084.

The Supreme Court of Vermont has reaffirmed the rule already established both in England and in the United States, that votes cast by legal voters for an ineligible candidate, it not affirmatively appearing that said voters knew the candidate to be ineligible, are not to be rejected in determining whether the opposing candidate has received a majority of the votes cast: *State ex rel. Goodell v. McGarry*, 38 Atl. Rep. 165.

For one person to induce another to leave an employment or to discharge an employe by persuasion or argument, however whimsical, unreasonable or absurd, is not in itself unlawful, but to intimidate an employer by threats, if the threats are of a character to produce this result, and thereby cause him to discharge an employe whom he desired to retain and would have retained except for such unlawful threats, is an actionable wrong: *Perkins v. Prindleton*, 38 Atl. Rep. (Supreme Judicial Court of Maine), 96.

In suit for damages to rental value of property by reason of

the construction and operation of elevated railroad, plaintiff's experts testified to the general course and current of values in the neighborhood. On cross-examination they were asked questions as to the change in rental value of specific properties. Held to be proper. On opening of defendant's case he offered testimony of experts as to specific prices of property to contradict the statements made by plaintiff's witnesses on cross-examination, and thus prove that they had not sufficient knowledge to render their testimony of any weight. Held inadmissible: *O'Sullivan et al. v. N. Y. El. R. R.*, (Supreme Court,) 46 N. Y. Suppl. 764.

Indictment for murder. When deceased was in *extremis*, the prisoner and a co-defendant, Wong Wing, were brought before him. Wong Wing on entering made a remark to deceased in Chinese. In the course of the dying declaration, which was then being written down for deceased, the district attorney asked what Wong Wing had said to him on entering. Held inadmissible: *People v. Wong Chuey*, (California,) 49 Pac. 834.

In the Circuit Court, Northern District of California, Morrow, Circuit Judge, has recently decided the following question of jurisdiction:

A firm residing and carrying on business in New York brought an action at law against the city of Santa Rosa, State of California, upon bonds, with interest coupons, issued by said city. Prior to the rendition of judgment the present complainant applied to intervene in that suit, on the ground that he was a resident and taxpayer of the city and desired to resist payment of the bonds; that they were illegal, and a proper defence was not being made. His motion was dismissed. Thereupon the complainant filed a bill in equity to enjoin the action at law and to obtain leave to intervene and defend. It was objected that the court had no jurisdiction, as the complainant and the city of Santa Rosa were both citizens of California. The court held that when a bill in equity is brought in the Circuit Court to enjoin and impeach the judgment rendered by a state court, the jurisdictional requisite of diversity of citizenship must exist. In this respect the suit is deemed an original, independent suit. But the present bill having been brought to enjoin a judgment in the United States Court, where the jurisdictional requisite of diversity of citizenship was satisfied, was

Evidence,
Cross-
Examination,
Collateral
Facts

Dying
Declaration

Federal Court,
Jurisdiction,
Ancillary
Bill in
Equity to
Enjoin Action
at Law in
Said Court

not an independent suit, but ancillary to that action. It could, therefore, be maintained.

The court, however, decided against the complainant on the ground that the previous ruling in the action of law, that ^{his} ^{status} as a taxpayer was not sufficient to entitle him to intervene, was applicable and conclusive against his right in the suit in equity—the ruling having remained without appeal or reversal: *McDonald v. Scligman*, 81 Fed. Rep. 753.

Cunningham v. Syracuse Improvement Co., 46 N. Y. Supp. 954. (Supreme Court,) is a fresh illustration of the old principle that in determining the question whether one is a servant of another, so as to make the other responsible for his work to strangers, and so as to exempt the other from liability to the one for the work of the other's servants, the sole test is whether the one is employed by the other and subject to his direction and control. If so, the relationship, with its legal consequences, exists, and it matters not that the servant is in the general employ of another, and only temporarily loaned for the occasion: *Wyllie v. Palmer*, 137 N. Y. 248 (1893), and *McInery v. Canal Co.*, 151 N. Y. 411 (1896), are cited as settling any doubt about the New York rule.

In *Mullane v. Houston, W. St. & P. F. R. Co.*, *id.* 957, it was held that a trackmaster of a cable road company represents the company, and that one who is injured while obeying his orders and relying on his promise to avert danger, has a cause of action against the company.

An interesting case on this ever interesting question is *Cerrillos Coal R. Co. v. Deserant*, 49 Pac. (N. M.) 807. Plaintiff's intestate had been killed in a coal mine by ^{Contributory} ^{Negligence} an explosion of gas; there was evidence that the room in which the gas had collected had been marked dangerous by the fire-boss, who was admitted to be a vice principal. The judgment for plaintiff was reversed, on the ground that the attention of the jury had not been directed to the defendant's legal position, which the Supreme Court now approves: to wit, that if deceased had seen the dangerous signal, and had in spite of it gone on with his work in an adjoining room, he was guilty of contributory negligence, and plaintiff could not recover, especially as the accident could only have taken place through the negligence and disobedience of a fellow-servant: *Sullivan v. Manufacturing Co.*, 113 Mass. 396 (1874); *Railroad Co. v. Baugh*, 149 U. S. 368 (1892), are followed.

Just what degree of affixing to real estate is necessary to constitute machinery part of the real estate, for the purpose of subjecting it to a mortgage in which it is not expressly mentioned, was the question raised and to be decided in *Dainler Motor Co. v. Bourn*, 41 Solic. Journ. 778. The case was presented in the form of an injunction, prayed for by both mortgagor and mortgagee, to prevent a subsequent vendor from selling the machinery. Security being given by plaintiffs, the machinery was delivered to them pending trial. It will be interesting to watch the result.

Ekstrom v. Hall, 38 Atl. (Me.) 106, decides that fixtures annexed to realty after execution of mortgage become part of the security, and cannot be removed without mortgagee's consent.

The Supreme Court of Oregon has recently decided that if a foreign corporation does business in a state, it renders itself subject to service of process upon its officers or agents in that state, and this, too, where there is no special provision to that effect in the laws of the state. The court said: "Now, by the laws and policy of this state, foreign corporations are as free to engage in business therein as corporations of its own creation; but, no special provision having been made for the service of process upon them . . . , it may be made in like manner as upon domestic corporations, and a return thereof, good in an action against the latter, will, under similar circumstances be good against the former." It is believed that the court was in error: *St. Clair v. Cox*, 106 U. S. 350 (1882); upon which the court relies does not support this view. That case holds that a state may declare, as a condition of a corporation's doing business within its borders, that the corporation shall be liable to service of process, and that that condition may be implied as well as expressed. For, "if a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission." The court, in the present case, implies not only the condition but also the statute imposing it: *Farral v. Oregon Gold-Min. Co.*, 49 Pac. Rep. 876.

An action for money had and received, (*McClure v. Law*,

46 N. Y. Supp. 775.) recently brought to light the details of a fraudulent scheme to gain control of an insurance corporation.

Fraud of
Director,
Money had
and Received

The defendant and other members of the board contracted to sell the management of the company to one Levy for the sum of \$15,000, and, in accordance with their agreement, resigned their offices from time to time as he requested, substituting in their places his nominees. The purchaser made good use of his bargain, and succeeded in thoroughly depleting the treasury of the once prosperous concern. The action against the defendant was based on the theory that, in receiving the bribe he had taken money belonging to the company; but the Supreme Court of New York reversed the verdict against him, on the ground that his act was one which the corporation could not have authorized or ratified, and, therefore, it could not be considered that he had acted as its agent.

Connecticut Bank v. Bolton, 46 N. Y. Supp. 734. (Supreme Court,) simply reiterates the old rule that *bona fide* transfers of property by a debtor before insolvency to pay his just debts will be sustained, unless the creditor has entered upon a fraudulent arrangement with the debtor intended to hinder and delay other creditors.

It is familiar law that a fraudulent grantee of property of an insolvent debtor who pays no consideration is bound to account for the same to the insolvent's creditors, whose remedy is by bill in equity. A neat application of this principle was made in *Sabin v. Anderson*, 49 Pac. 870 (Oregon.) Anderson before failing left certain promissory notes, aggregating \$6500, payable to his order with a banker, Lively, who gave him a certificate for this amount, knowing that his purpose was to conceal the notes from his creditors; subsequently, Lively, fearing that the certificate would be endorsed to an innocent holder, indirectly purchased it from Anderson for \$2800. Held (1) Lively was liable to Anderson's creditors for amount of notes; (2) as the \$2800 was paid not to restore the property but to protect himself, he is entitled to no deduction therefor; (3) creditor's right to resort to bill in equity is not taken away by statutory proceeding by attachment, which is not an adequate and complete remedy.

A guardian is entitled, by virtue of his appointment, to the

custody of his ward's estate, consequently an order of court, authorizing him to claim a deposit, "only as authorized by this court," is invalid. If the court should assume to determine the propriety of the guardian's proposed dealings, it would be usurping his place. *In re Welch's Estate*, 110 Cal. 605 (1896), where the same principle is applied to a court's interference with an administrator's duties, followed: *De Greayer v. Superior Court of City and County of San Francisco*, 49 Pac. (Cal.) 983.

In re Bolton, 46 N. Y. Supp. 908, (Supreme Court,) decides (1) a guardian has no right to invest his ward's personalty in real estate, and if he does so, the ward can elect whether he will take the realty or demand an accounting of personalty; (2) if authorized by court to so invest, the realty remains personalty, and will pass as personalty under the intestate laws or the infant's will.

A guardian's duty is personal, and terminates with his death; his sureties are responsible for his faithful administration and for the production to the new guardian of the ward of the estate unimpaired at the guardian's death. They are not, however, entitled to possession of the estate at the time of his death, and are under no duty to administer the same: *Garrett v. Reese*, 27 S. E. (Ga.) 750.

Transactions between husband and wife, by which either's creditors may be defrauded, are always regarded jealously by the law; consequently it was held in *Perkins v. McCullough*, 49 Pac. (Oregon) 861, that where a woman testified that property owned previously jointly had been divided orally between herself and her husband, and the husband denied, the wife's evidence—which would, if believed, result in a fraud on creditors—should be disregarded.

In *Donaldson v. Grant et al.*, 49 Pac. 779, the Supreme Court of Utah held that a note payable in five years, a mortgage on certain real estate being given as collateral security, which provided that "if default be made in the payment of any of the interest after it becomes due, or failure to comply with any of the conditions or agreements contained in the mortgage given herewith, then said principal sum, with the accrued interest thereon, shall, at the option of the holder, become due and payable," was unnegotiable, as the mortgage

**Guardian,
Authority
of Court**

**Guardian,
Power to
Invest**

**Guardian,
Death of,
Liability of
Sureties**

**Husband
and Wife,
Fraudulent
Conveyances**

**Independent
Promises in
a Promissory
Note
Affecting Its
Negotiability**

contained covenants for the payment of taxes, assessments and insurances, and that, therefore, it was not a promise to pay a certain specified sum.

The correctness of this decision cannot be questioned. See *Smith v. Nightingale*, 2 Starkie, 375 (1818).

The Supreme Court of New York has decided where a verbal arrangement has been made to rent premises for a period of thirteen months at a rent payable monthly, and the lessee executes a written lease, enters and pays monthly, but the lease is not signed by the lessor until several months after possession has been taken by the lessee, and subsequent to a time when the lessee, having given one month's notice to the agent of the lessor of his intention to leave the premises, has moved out, that as the lease was not executed by the landlord there was no legal obligation created under it, that being a parol lease for more than one year it could not be sustained, and that the lessee was only a tenant from month to month, and therefore could leave the premises after one month's notice: *Lawrence v. Hasbrouck*, 46 N. Y. Suppl. 868.

A provision in a lease was to the effect that the lessee would permit the lessor to "enter said premises at all reasonable hours to examine or make such repairs or alterations therein as shall be necessary, or as he may consider necessary, for the preservation or improvement thereof." It was held by the court that such provision must be construed together as a whole, and that it would not justify a lessor in entering and building two additional stories upon the top of the leased premises in which he carried on a rival business. A temporary injunction obtained in the case by the lessee having been subsequently vacated upon the lessor giving bond to cover damages resulting to the lessee by reason of the alteration, it was held on final hearing that while the lessor had no right to build the additional stories, the proper relief to be given to the lessee was not to compel a destruction of the stories already erected, but to award damages for his actual loss consequent upon the building, and to issue an injunction restraining the lessor from carrying on the rival business: *Hessler v. Schaffer*, 46 N. Y. Suppl. 1076.

In *Hutheff v. Magr* (1897), 46 N. Y. Suppl. 905, the City

**Liability of
Maker of Note
to Bona Fide
Purchaser for
Value
Upon a Note
Procured by
Fraud**

Court of New York has laid down the rule "that where a party is induced to sign a negotiable instrument by reason of fraud, artifice or deception practiced upon him by another as to the nature of the instrument, and the maker signs the same innocently, under the belief that it was a contract of another character, there can be no recovery upon the note, although the holder may be an innocent purchaser for value before maturity, unless the maker was guilty of laches or carelessness in omitting to read the same, or by some other means ascertaining the true nature and import of the instrument."

**Lease for Life,
Constitutional
Construction**

The lease of a farm was made by one Parish, in 1888, to last during the lifetime of himself and wife, and reserving a certain rent payable quarterly to him for life, and after his death to his widow. The lessor died in 1889, and by his will left the premises in question to the plaintiff, the lessor's widow being living at the time. The plaintiff brought an action of ejectment against the tenant in possession on the ground that the lease was void under the Constitution of the State of New York, article 1, section 13, which provided "no lease or grant of agricultural land for a longer period than twelve years hereafter made, in which shall be reserved any rent or service of any kind shall be valid." In the Appellate Division of the Supreme Court of New York, Judges Green, Ward, and Hardin held that the constitutional prohibition did not render the lease for life void *ab initio*; that the Constitution must be strictly construed according to its terms, and, as it had not in terms included leases for life in the prohibition, it would not be proper to so include them, although the same reasons for the prohibition might exist as existed in the cases of leases for more than twelve years.

The provision of the Constitution must be construed as simply a limitation upon the duration of a lease for life, which may determine within that period, and is not one which annuls the instrument by which such lease is created. The court also called attention to the analogy between this interpretation and the construction of that section of the Statute of Frauds, declaring certain contracts void which are not to be performed within one year. See *Kent v. Kent*, 62 N. Y. 560; *Peters v. Westborough*, 19 Pickering, 364. Judges Follett and Adams dissented on the ground that the spirit and purpose of the Constitution covered the case of leases for life as well as for a

term of years. It would seem that the sounder view is that adopted by the majority of the court in holding that a written instrument, such as the Constitution of a State, should be strictly construed, and that it is fair to presume if there had been any intention to make such a radical change in the existing law as the prohibition of the creation of lease for life, it would have been distinctly and carefully set forth: *Parish v. Roger*, 46 N. Y. Suppl. 1058.

The Circuit Court of Appeals for the Ninth Circuit has rendered an important decision in regard to the lien of material men who furnish supplies to a vessel in a foreign port. The question was whether a forfeiture to the government because of an infingement of the Act of Congress (Apr. 6, 1894), prohibiting the killing of fur seals within sixty miles around Pribilof Islands, would avoid a prior lien for supplies and other necessities furnished, on the credit of the ship and at the request of the master, in a foreign port. The court reviewed the authorities from the *St. Jago de Cuba* (9 Wh. 410, 1824), down, and held that while only one case, the *Florenzo*, Blatch. & H. 52 (1828), was in point, the *dicta* in the other cases all supported the view that the lien was not cut off. The court said: "The right of a lienor, who in good faith has furnished supplies and materials to a vessel, in ignorance of any purpose on the part of her master or owners to devote her to an illegal use, should not be overreached by a subsequent forfeiture of the vessel. The lien, as has often been said, is created for the benefit of the ship, to enable her to reach her destination. It would seriously impair the power of her master to procure supplies in a foreign port upon her credit if the materialman is to hold his lien subject to the contingency that the vessel may incur forfeiture under one of the many provisions of law, the violation of which would render her liable thereto." *North American Com. Co. v. United States*, 81 Fed. Rep. 748. Since the maritime lien is given to enable the vessel to obtain credit in a foreign port, *quære*, as to whether the decision would not be different in the case of a lien conferred by statute of the state for supplies furnished at the home port?

State v. Shattuck, 38 Atl. (Vt.) 81, is a very important case. Upon a prosecution for adultery it was proved that one Coburn,

**Marriage and
Divorce,
Conflict of
Laws** a resident of Vermont, was divorced in December, 1895; that on June 13, 1896, he went to New Hampshire, and there married Grace Holsington, a resident of Vermont, their intent being to evade the laws of Vermont, which prohibited Coburn, as a divorced person, from remarrying. The defence here is that this marriage was unlawful. A conviction, however, was sustained, the court holding that the validity of the marriage was to be determined by the laws of New Hampshire, there being nothing in the Vermont Statute to the contrary: *Brook v. Brook*, 9 H. L. C. 193 (1861), is sharply criticised.

**Married
Women,
Testamentary
Capacity** The Supreme Court of Tennessee has recently decided that where a married women made a will at a time when she had no testamentary capacity under the Statutes of the State, the fact that she retained such paper for over twenty years after the passage of a Statute of Tennessee, giving a married woman power to make a will, and often referred to the paper as her will, was not sufficient to render the instrument in question a valid will. The statute was not retroactive, and the instrument was not republished in any of the ways recognized by law after the passage of the statute giving testamentary capacity to married women. It was further held that a section in the Tennessee Code to the effect that "a will shall be construed, in reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator," referred simply to the *quantum* and nature of the property devised by the will, and could not validate a will invalid at the time of its execution: *Mitchell v. Kimbrought*, 41 S. W. Rep. 993. The latter part of the decision accords with the view of the Pennsylvania courts in the interpretation of a similar statute. See *Neale's Appeal*, 104 Pa. St. 215 (1883); *Carl's Appeal*, 106 Pa. St. 635 (1884); *Quin's Estate*, 144 Pa. St. 444 (1891); *Miller's Estate*, 145 Pa. St. 361 (1891).

**Master and
Servant,
Contract of
Service** The ordinary contract of employment stipulating for monthly wages is in the eye of the law a contract from month to month and terminable by either party upon a month's notice; this principle was applied in *Tennessee Coal-Iron Railroad Co. v. Pierce*, 81 Fed. 814, to the case of an injured employe, and it was there held that the fact that part of the inducement to the company

was that it might be liable for damages if it did not make the contract, did not convert the contract from a monthly to a life contract. *Pardoe, C. J., dissented.*

In *Coleman v. United States*, 81 Fed. 824, it is held that one who works more than eight hours a day for the United States without protest has no right of action ^{Right Now} against the government for the extra time. Rev. Stat. 83,738, fixing eight hours as a day's labor being contracted with mail carrier's Act of May 24, 1888, expressly conferring extra pay for extra time.

Kaiser v. McLean, 46 N. Y. Supp. 1038, admits the old rule that a master is liable for the work of his agent only ^{Scope of} within the scope of his employment, but presents ^{Employment} a rather doubtful application of the rule in deciding that the master who employs an agent to keep lighted and protected the lamps on a public street is not liable for injury done to a boy by the agent who was chasing him off with perhaps unnecessary severity.

Farris v. Deming Investment Co., 49 Pac. (Okl.) 926, illustrates an important principle of law with respect to obtaining title to land in new and unsettled countries. In a proceeding to foreclose a mortgage an answer was ^{Mortgage,} held invalid upon demurrer which set up that a ^{Validity of} patent had not been issued by the government at the date of the mortgage, the court holding that as soon as a person was (by § 4 of Homestead Act, 12 Stat. 1393) entitled to a patent he may deal with the land precisely as if the patent had issued.

In *Schroeder v. Kinney*, 49 Pac. (Utah) 894, Kinney, after mortgaging his land to Derge, conveyed it to Owens, subject ^{Security for} to the mortgage debt; when the notes for which ^{Debt} the mortgage was security fell due, the time for payment was extended by Derge without Kinney's knowledge. Held that as Kinney had become a surety for the payment of the debt by his sale to Owens, he was discharged from personal liability on the notes by the extension for payment given without his consent.

In *Rogers v. Barnes*, 47 N. E. (Mass.) 602, an interesting and somewhat novel question was presented, viz., whether a ^{Power of} mortgagor can maintain an action and recover the ^{Sale} full value of his land against a mortgagee who had sold the land under a power of sale contained in the mortgage to a *bona fide* purchaser for value. A majority of the court, though conceding that the mortgagor could have recovered the land from the purchaser, nevertheless held that

he could recover its value from the mortgagee, the court likening the case to that of an unlawful conversion of pledged goods; three judges dissented, taking especial exception to the analogy.

The case of the *Fla. Cent. & Penin. R. R. Co. v. Osceola St. & Sub. R. R. Co.*, 22 So. Rep. 692, raises a question as to the power of a municipality to surrender the control of its streets to private parties. The Supreme Court of Florida decided that the power of the municipality to "regulate, improve, alter, extend, and open streets, lanes, and avenues," did not render valid an ordinance vesting in a street railway corporation an exclusive right to construct tracks on all the streets of the city as then laid out or that might thereafter be laid out for a period of ten years. In view of the franchise-grabbing propensities everywhere prevalent, a decision such as this is very welcome.

The Supreme Court of New York, in *Wagner v. New York Condensed Milk Co.*, 46 N. Y. Supp. 959, decided that one who leaves his horse unhitched and unattended in the street, and the horse starts forward and injures a bicycle, which has been left standing in the roadway against the curb, a few feet away, is liable for the injury, and whether the person leaving the bicycle there without ascertaining whether the horse was guarded, is guilty of negligence, is a question of fact for the jury.

The Court of Appeals of New York has decided that where a statute provided for a tax on bank stock, with the further proviso that the tax should remain a lien thereon till paid, a payment made by a holder of such stock was an involuntary one, and the same could be recovered upon the statute's being declared unconstitutional: *Etna Ins. Co. v. Mayor of New York*, 47 N. E. 593.

The Supreme Court of South Carolina has decided that the transferee of a promissory note, transferred after maturity, takes the same subject to equities; and also that the fact that a note is payable to a probate judge, in his official capacity, is sufficient to put on inquiry anyone to whom he tenders these notes in a private capacity: *Freeman v. Bailey*, 27 S. E. 686.

In the Circuit Court of the United States, Eastern District of Pennsylvania, the following ruling in practice was recently made: A trial had been commenced and some testimony had been taken, when, by agreement of parties, a juror was withdrawn. A director of the company defendant, who had been examined at that unfinished trial, was afterwards recalled for examination under a rule of court which provided that "a rule may be entered by either party to take the depositions of witnesses without regard to the circumstance of their being ancient, infirm or going witnesses, stipulating eight days' notice to the adverse party." Under advice of counsel the witness declined to answer. The plaintiff moved for an order on the witness requiring him to testify, under the eight-day rule, touching a certain agreement. Dallas, Circuit Judge, stated that the above clause seemed to have been derived from a rule of the courts of the State of Pennsylvania, but its validity as prescribing a mode of procedure for this tribunal was attacked upon the ground that it is in conflict with section 861 of the Revised Statutes. It was not desirable to pass upon this broad question. It was not pretended that any fact existed to bring the proposed examination within any of the specified exceptions of that section, which is in these words: "The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided." Under *Ex parte Fisk*, 113 U. S. 713 (1884), the motion was denied.

A motion for reargument was also denied: *Skellabarger v. Oliver*, 64 Fed. 306 (1894), and *Register Co. v. Leland*, 77 Fed. 242 (1896), were followed.

From this disposition of the question, it appears that the Act of Congress of March 2, 1892, which enacts that it shall be lawful to take the deposition or testimony of witnesses in the mode prescribed by the laws of the state in which the courts of the United States are held, does not extend the right to take the testimony of a witness by deposition in advance of trial, when no good reason exists for taking such testimony: *Despaux v. Pennsylvania R. R. Co.*, 81 Fed. Rep. 897.

Promissory Notes, Rights of Indorsers

The maker and indorsers of a promissory note having been sued together, counter-claims successfully pleaded by the former, enure to the benefit of the latter: *Wolf v. Michael*, 46 N. Y. Suppl. 991. (Supreme Court.)

A recent law of the State of Florida, providing for a State Board of Examiners, who were to establish a uniform method of legal examinations, has been declared unconstitutional, not on the ground that the admission of attorneys is a matter solely for the discretion of the courts, as was intimated in Pennsylvania in *Splane's Case*, 123 Pa. 527 (1889), but since the Constitution of Florida makes all public officers subject to election by the people, or appointed by the governor. The act in question directed the judges of the Supreme Court to appoint the examiners: *State v. Hocker* (Supreme Court of Florida), 22 So. Rep. 721.

The Superior Court in Pennsylvania has recently been obliged to apply the decision of the Supreme Court in what cannot but be described as the unfortunate case of *Godcharles v. Wigman*, 113 Pa. 431 (1886). In that case it was held that the Act of 1881, so far as it prevented an employer from contracting with his workmen to pay them in store orders, was unconstitutional. Since this decision the Act of May 20, 1891, P. L. 96, provides that wages shall be paid semi-monthly in lawful money of the United States. The plaintiff had paid in store orders, and the question was whether this, in view of the later Act, was a good defence. The Superior Court could do nothing else than follow the decision of the court of last resort. It is hoped that the case will now be appealed, and the whole question of the sacredness of the right of a workman to contract that his wages be paid in store orders be reopened. The "store-order system" has been described as the curse of the laborer. Whatever the merits of the question, that is the feeling of the laborer himself; and it was at his instance that the Act of 1881 was passed. Is not there something akin to solemn mockery in a court setting aside an act designed to do away with a species of bondage, on the ground that it interferes with the bondsman's right as a freeman to put himself in bondage? *Showalter v. Eklan*, 5 Pa. Sup. 242.

The Supreme Court of Vermont has recently been called upon to interpret a will where a testator, who, with his wife, was well advanced in years, and who had but one child, a married woman, gave all his estate to his wife for life, and after her death to his daughter for life, with remainder to the heirs of her body, and should the daughter "die, leaving no heirs of her body, or should I at any future

Public
Officers,
Boards of
Examiners

Right to Pay
Laborers
in Store
Orders

Rule Against
Perpetuities

time fail to have heirs of my body, then it is part of my will and testament" that my property shall go to the Congregational Church, etc. The court held that the words "die, leaving no heirs," imported that the time when the estate was to pass to the church, if ever, was the death of the daughter, and that the added words, "or should I at any future time fail to have heirs of my body," were referable simply to the death of the daughter, and that, therefore, the gift over to the church did not violate the rule against perpetuities. This case seems to go very far in considering the age and situation of the testator in endeavoring to construe his language: *Wall's Estate*, 38 Atlantic Reporter, 83.

The Supreme Court of Oklahoma, in *Hixon v. Cuyper*, 49 Pac. Rep. 927, decided that it was the duty of the sheriff to protect the prisoners in his charge from unlawful assaults upon such prisoners by others, also confined in the county jail; and in this case a sheriff was held responsible in damages to a prisoner who was thus assaulted, the sheriff having known of the contemplated assault, and not using every reasonable means to prevent it.

There are some legal rights which cannot be surrendered by any contract or agreement, and such was held to be the statutory right of a stockholder in a building association to withdraw therefrom, after giving 30 days' notice (Rev. St. Mo., § 2810), in spite of an express declaration in the certificates that there shall be no right of withdrawal until one hundred months from the issuance of the stock: *Latimer v. Eq. Loan & Ins. Co.* (Cir. Ct. W. D. Mo.), 81 Fed. Rep. 776.

The Supreme Court of Oregon has rendered a decision on one phase of the question on which there is such a great conflict of authorities in the United States, viz: whether the validity of a statute may be inquired into, and the presumption from due enactment overturned, by the journals of the legislature. In that decision the court, following *Currie v. Southern Pacific Co.*, 21 Ore. 566 (1891), and *State v. Rogers*, 22 Ore. 348 (1892), holds that, in order to impeach the validity of such statute, it must affirmatively appear from the journals that it did not, in fact, receive the approval of the constitutional number of members of the legislature; that mere silence of the journals is not

sufficient; hence an enrolled statute, signed by the proper officers and filed in the office of the Secretary of State, will be deemed to have been enacted as enrolled, though the journals show that in its progress through the legislature an amendment was adopted which was not included in the enrolled act, the presumption being that the vote by which such amendment was adopted was reconsidered and the amendment defeated: *McKennon v. Cotner et al.* (American Fire Insurance of Phila., garnishee), 49 Pac. Rep. 956.

The Supreme Court of Idaho has gone a step further, holding that the rule that mere silence of the journals to show that a certain thing was done does not prove that it was not done, is not the law in Idaho, but that the journals of the legislature are not only the best evidence, but the exclusive evidence of what was done by the legislature, and the courts must impute to the record and statements in the journals absolute verity, and that the failure of the journals to show that any constitutional requirement was obeyed is conclusive evidence that such requirement was not obeyed: *Cohen v. Kingsley*, 49 Pac. Rep. 985.

The Supreme Court of California has again decided that, notwithstanding the general rule that the law does not take cognizance of fractions of a day, the court may, when substantial justice requires it, ascertain the precise hour when a statute took effect; and that in determining the question no account is taken of the time it received the sanction of the two branches of the legislative department, but what must be looked to is the precise hour of the day when the statute received the executive approval: *Davis v. Whidden*, 49 Pac. Rep. 766.

The construction of a statute involving the meaning of words used therein is a question of law. If there is no statutory definition and the words are not of common import, or have a technical meaning, or are terms of art or science, the judge in construing them may refer to persons who have knowledge upon the subject, or he may consult documents or books of reference; in fact may take such means as he deems advisable to inform himself: *State v. Strvus* (Supreme Court of Va.), 38 Atl. Rep. 80.

A surety is, of course, relieved from liability by a change in the contract made without his consent. So in *Yahn v. Stormaker*, 5 Pa. Super. Ct. 320, it was held that a surety who had signed a judgment note

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Suretyship

under the agreement that it was to be filled up, payable at six months, was relieved from liability to creditor who made it payable at once; also, held, that surety is relieved from liability by failure of creditor to obtain signature of principal. This is an implied condition of a contract of suretyship.

One of several co-tenants, against whom all taxes were assessed while he and the assessor both supposed that he was the sole owner of the land, is not entitled in a partition suit to any reimbursement for the payment of such assessments: *O'Leary v. Quinn*, (Supreme Court of Rhode Island,) 38 Atl. Rep. 7.

In a recent case the Supreme Court of New York held that a bequest to a voluntary unincorporated association for a charitable purpose was void, on the ground that the association had no legal capacity to receive the bequest. This decision is in accordance with and follows the earlier New York cases: *Owens v. Society*, 14 N. Y. 380 (1856); *Downing v. Marshall*, 23 N. Y. 366 (1861); *Skerrwood v. Society*, 40 N. Y. 561 (1869), which decide that the law of charitable uses, as it existed in England at the time of the Revolution, is not in force in New York, and that neither the Statute of 43 Elizabeth nor its principles are in force, and that trusts for charities must be treated as any ordinary trusts.

In the same case, following the decision of *Fordick v. Hempstead*, 125 N. Y. 581, it was held that a bequest of \$1000 to the poor of St. Peter's Roman Catholic Church in Barclay street was void; that, while the church was incorporated, the bequest was not to them; and, even if there had been a trustee competent to take, the bequest to the poor of the parish was void for indefiniteness: *Pratt v. Orphans' Asylum*, 46 N. Y. Suppl. 1035.

A trial judge cannot, in an action of tort, and on motion of the successful party, set aside a verdict as being "against the evidence," because, in his opinion, the amount of damages recovered is inadequate; nor can he set it aside on the ground of inadequacy unless it appear to be the result of passion, prejudice, corruption, unaccountable caprice, or other improper influence; *Jenkins v. Hawkins* (Supreme Court of Tennessee), 41 S. W. Rep. 1028.

In two recent cases in the Chancery Division of England, one before Kekewich, J., *In re Parker*, [1897] 2 Ch. 208, and the other before Romer, J., *In re Walker*, [1897] 2 Ch. 238, words importing legitimate descendants have been held to include illegitimates, because of the language of the will. In the former of these cases, an illegitimate nephew was held entitled to share in a bequest to the "nephews and nieces" of the testator's wife, because the testator had previously spoken of him as his wife's "nephew;" and in the latter, an illegitimate daughter of a niece was allowed to share in a bequest to the "issue" of nephews and nieces, since the testatrix had elsewhere spoken of her as "my great-niece."

On an indictment for larceny, the prisoner became a witness on his own behalf. Held improper for the prosecuting attorney to ask him whether he had not been expelled from church membership, and whether he had not been disbarred upon charges preferred by a bar association, accusing him of larcenies other than the one in question: *People v. Dorothy* (Supreme Court), 46 N. Y. Suppl. 970.

Witness,
Cross-
Examination,
Testifying on
Own Behalf

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CARRIERS; EXCEPTIONS IN BILL OF LADING. In *Fairbanks & Co. v. Cincinnati, N. O. & T. R. Ry.*, 81 Fed. 289 (Ohio), (May 17, 1897), it was held that a common carrier's exemption from liability for loss from "accidents to boiler and machinery" did not cover the case of a broken axle.

It is well settled that exemptions in favor of a common carrier in bills of lading are to be strictly construed against the carrier, and that any doubt or ambiguity therein is to be resolved in favor of the shipper: *Black v. Transportation Co.*, 55 Wis. 319; 13 N. W. 244; *Railway Co. v. Talbot*, 39 Ark. 524; *Norman v. Birmingham*, 25 Q. B. D. 475, 477; *Taylor v. Steam Co.*, L. R. 9 Q. B. 546, 549; *Barton v. English*, 12 Q. B. D. 218, 224; *Crown City R. R. Co. v. Chi., M. & St. P. Ry. Co.*, 63 Wis. 93; 23 N. W. 425. "And when the particular dangers or risks against which the carrier has specifically guarded himself in his receipt are followed by more general and comprehensive words of exemption, the latter are to be construed to embrace only occurrences *quodam generis* with those previously enumerated, unless there be a clear intent to the

contrary:" Hutch. Carr. §§ 275, 276; *Hawkins v. Railway Co.*, 17 Mich. 57; *The Caledonia*, 157 U. S. 124; 15 Sup. Ct. 537.

Light is thrown on the meaning of the phrase "accidents to boiler and machinery," when we note that the bill of lading applies to carriage by sea and land. The juxtaposition of the words "boiler" and "machinery" shows that machinery refers to the group of mechanical parts connected with the boiler and steam supply by which power is generated and applied and the vessel is propelled through the water. The term must have the same limitations when applied to a train of cars. Hence "machinery" only includes the mechanical instrumentalities present in the locomotive or directly connected therewith and necessary for the propulsion of the train. An axle of a car certainly cannot be included within the term.

Judgment in court below for defendant reversed, and new trial ordered.

TAXATION; EXEMPTION OF RAILROAD PROPERTY. It has been said that property, indispensably necessary to the operation of a railroad, is exempt from taxation in the absence of any provision contained in the charter of the corporation. Applying this test, the Superior Court of Pennsylvania held—reversing the decree of the court below—repair shops of a railroad used exclusively for repairs, and in which no new stock was built, exempt from local taxation: *Western N. Y. and Pennsylvania Railway Co. v. County of Venango*, 5 Pa. Superior Ct. R. 304 (July 23, 1897).

The reasoning by which the court arrived at this conclusion is indicated by the following excerpt from the opinion of Mr. Justice Orlady. "Public policy requires that everything which tends to increase the danger of travel upon railroads should be prevented. The propelling power used in hauling the numerous freight and passenger trains at a high rate of speed; the responsibility for safe road-bed, engines, and cars, require that the railroad company shall have as means to meet these responsibilities, and to discharge these duties, the fullest opportunities with the freest use which is deemed necessary to the safe management of the road. Given an engine or car derailed, or parts of an engine or car broken, then repair shops as such, and storage-houses for duplicate parts of engines and cars, necessary machinery and appliances, become as indispensably necessary to the proper exercise of the corporate franchises of the railroad company, in the discharge of their duty to the public, as are passenger, freight, and water stations, tanks, and tool-houses along the line of their roads:" *Schnylkill Bridge Co. v. Frailey*, 13 S. & R. (Pa.) 422 (1825); *Worcester v. Western R. R. Co.*, 4 Met. (Mass.) 564 (1842); *R. R. v. Berks County*, 6 Pa. 70 (Woodward dissenting), 1847; *Vermont Cent. R. R. Co. v. Burlington*, 28 Vt. 193 (1855); *Illinois Cent. R. R. Co. v. McLean County*, 17 Ill. 296 (1855); *Shamokin Valley R. R. v. Livermore*, 47 Pa. 465 (1864); *Worcester Co. v. Worcester*, 116 Mass. 193 (1874);

States v. Middle Twp., 38 N. J. L. 270 (1876). While the decisions cited uphold the conclusion reached by the court, cases are not wanting in which such exemption has been denied; it cannot be said, therefore, that the exemption is sustained by weight of authority: *Phila. R. R. v. Burgess*, 2 Gill (Md.), 355 (1844); *Louisville, etc., Canal Co., v. Com.* 7 B. Mon. (Ky.), 160 (1846); *Providence R. R. Co. v. Wright*, 2 R. I. 439 (1853); *Marine R. R. Co. v. Portland*, 57 Me. 444 (1854); *R. R. v. Connelly*, 10 Ohio, 160 (Sutliff dissenting) (1859); *Burlington R. R. v. Spearman*, 12 Ia. 112 (1861); *Orange, etc. R. R. Co., v. Alexander*, 17 Gratt. (Va.) 176 (1867); *Boston R. R. v. Lowell R. R.*, 124 Mass. 368 (1878); *People v. Comm'rs of Taxes*, 82 N. Y. 460 (1880); *P. C. & R. v. Vandyke*, 137 Pa. 249 (1890).

EQUITABLE ASSIGNMENT. In *Clark v. Ligna Iron Co.*, 81 Fed. 310 (June 1, 1897), the Circuit Court of Appeals has made a very broad application of the doctrine of equitable assignment. The Ligna Iron Company, being a debtor to one Clark, and a creditor of one Vandevort and others of its stockholders, made a contract with Clark, for a present consideration, to undertake to collect the amount due by Clark by litigation, if necessary, to be placed in the hands of Clark's attorney. It was also argued in the contract that, if any money was collected by the company from Vandevort, it should be paid to Clark, and that, if any judgment was obtained against Vandevort, it should be assigned to Clark on request.

Clark then appointed an attorney, who brought suit against Vandevort in the name of the iron company, and obtained a judgment. At this time the company was placed in the hands of a receiver, and after that the attorney collected the amount of the judgment and paid it to Clark. The receiver sued Clark to recover the judgment, and Clark's defence was that the contract made by the iron company was an equitable assignment of its claim against Vandevort. The judgment below was for the plaintiff.

The Court of Appeals said that, according to the contract made, not a dollar of the claim collected by the judgment was to come into the company's hands, but that, after the judgment was recovered, the plaintiff was bound to assign such judgment to Clark, as a mere formal duty to clothe Clark with the legal ownership, for the equitable ownership already vested in him.

As the judgment was not an asset of the company, it could not be relieved of its duty to Clark by the appointment of a receiver.

The former English doctrine was that an order payable out of a particular fund would operate as an assignment of the fund, but that a mere promise to pay out of such a fund would not: *Bradley's Case*, Ridgeway, 194 (1744); *Bispham's Equity* (Fifth Edition), pp. 249-50.

This rule has been followed in America: *Christmas v. Russell*,

14 Wall. 69 (1871). In that case it was held that a mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund even in equity. To make an equitable assignment there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right on the party meant to be provided for. If the holder of the fund retain control over it, that is fatal to its being an equitable assignment.

Christmas v. Russell (supra) has been generally followed in this country, and the lower court, in the case under discussion, relied upon it in giving judgment for the plaintiff for want of a sufficient affidavit of defence. According to the terms of the agreement between Clark and the iron company, it is a promise to use every effort to collect the amount due, to let Clark appoint an attorney to sue, if necessary, and to pay over to Clark all the money collected by the iron company from its stockholders. The suit is brought in the name of the promisor, the iron company, and the company is to collect the judgment by its attorney and pay it to Clark, and, therefore, the lower court held that the control had not passed from the company, but that the agreement was purely executory, as an intention to create a present assignment could not be inferred from the terms expressed; and, therefore, according to the rule of *Christmas v. Russell (supra)*, this was not an equitable assignment.

The Court of Appeals, in reversing this decision, seems to have gone over to the later English doctrine, as expressed in *Radick v. Gandell*, 1 DeG. M. & G., 763 (1851), a promise to pay out of a particular fund does operate as an assignment. The Court of Appeals says: "As against Vandevort the legal ownership and right of action had remained in the trustees, but when the right of action was merged in the judgment—and that, too, by the action of attorneys of *cestui que trust*—the iron company was a mere dry trustee, whose sole remaining duty was to assign such judgment on request," thereby considering that the duty of the iron company to assign *in futuro* was sufficient to constitute a valid present equitable assignment.

FOREIGN CORPORATIONS; SERVICE OF SUMMONS ON OFFICER TEMPORARILY WITHIN THE JURISDICTION. In the case of *Farrell v. Oregon Gold Mining Co.*, 49 Pac. 876 (July 31, 1897), the Supreme Court of Oregon held, that a foreign corporation doing business in Oregon is subject to its laws, and hence, as there is no special law relative to service upon it, a service upon its president is *prima facie* sufficient, though the return does not show he was authorized to represent the corporation, in view of the statutes providing for such service upon domestic corporations.

The question was raised on a motion to vacate a judgment entered against the defendant corporation by default. It does not appear whether the corporation was actually doing business in the State

at the time of the service, but the court seems to treat it as a fact. At any rate, the court disregards the question whether the president was in the State on the business of the corporation or not, and seeks to draw an analogy between a domestic and foreign corporation, so far as the president's authority to receive service is concerned. The principle laid down is rather broader than the facts of the case warrant.

There is considerable confusion in the law on this question. The distinction would seem to be, that so long as a corporation confines its operation to the State within which it is created, it cannot be sued in a State where it has no office or transacts no business, by serving process on its president or other officer when accidentally present within such State: *Thompson on Corporations*, § 7994; *Moulin v. Trenton Mut., etc., Co.*, 24 N. J. L. 221; *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15 (1867); *U. S. v. American Bell Telephone Co.*, 29 Fed. 17 (1886). But when a foreign corporation sends its officers and agents into another State, and establishes its business there, it is liable to be brought into the courts of such State by a service of process upon such officers so acting for it: *St. Clair v. Cox*, 106 U. S. 350 (1882).

Sometimes the amount of business done by a foreign corporation in a State, where it is sought to be held by service on its president or other officer, is important: *Clews v. Woodstock Iron Co.*, 44 Fed. 31 (1890).

In some jurisdictions it has been held, that, under various legislative acts, service upon the president or other officer of a foreign corporation is good even though that officer be in the State temporarily and on no business of the corporation: *Pope v. Terry Haute Car Co.*, 87 N. Y. 137 (1881); *Hiller v. R. R.*, 70 N. Y. 223 (1877); *Iron Co. v. Construction Co.*, 14 Am. & Eng. Corp. Cases, 16 (Mich., 1886); *First Nat'l Bank v. Burch*, 80 Mich. 242 (1890). In Pennsylvania such service is not good unless the corporation has an actual place of business within the State: *Phillips v. Library Co.*, 141 Pa. 462 (1891). See also *U. S. Graphite Co. v. Pacific Co.*, 68 Fed. 242 (1895). By far the greater weight of authority is in favor of the proposition that service on an officer of a foreign corporation who is temporarily in the jurisdiction not on business for the corporation is valid: *St. Clair v. Cox*, 106 U. S. 350 (1882); *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98 (1890); *Goldley v. Morning News*, 156 U. S. 318 (1894); *Rust v. Waterworks Co.*, 70 Fed. 129 (1895); *Middlebrook v. Ins. Co.*, 14 Conn. 301 (1841); *Latimer v. R. R.*, 43 Mo. 105 (1868); *Peckham v. North Parish*, 16 Pick. Co. (1834); *Minnesota v. Imp. Co.*, 26 Minn. 233 (1879); *Fox v. Carrugi*, 41 Ga. 671 (1871); *Fox v. Hale, etc., Co.*, 42 Pac. 308 (Cal., 1895); *Gravely v. Southern Ice Machine Co.*, 26 So. Rep. 866 (Louisiana, 1895).

BOOK REVIEWS.

SELECTED CASES ON THE LAW OF SALES OF PERSONAL PROPERTY. By FRANCIS M. BURDICK DWIGHT, Professor of Law in Columbia University School of Law. Boston: Little, Brown & Co. 1897.

Of late the publication of case-books has become quite popular. In many branches of the law there are more than one of these collections of cases. Professor Burdick has added another to the list by the publication of a volume containing two hundred and sixty-two cases illustrative of the law of sales. Its special mission seems to be to illustrate the author's text-book, noticed in this department last month. Its divisions and arrangement of subject-matter correspond with those of the text-book. The two thus supplement one another, forming together a course of study, combining theory and the cases, as distinguished from a case course, pure and simple. To many such a course seems preferable to the case system. Except for this purpose of combining theory and practical case analysis, there would seem to be no demand for a new case-book on the law of sales. The sale of case-books must necessarily be very limited, and duplication only serves to maintain prices at a figure which taxes the purse of the student severely. As to the character of the book little need be said. It follows the admirable classification of the text-book, and the cases seem well selected, and many of them of recent date. The mechanical perfection of the work is to be commended.

O. J. R.

THE CODIFIED NEGOTIABLE INSTRUMENTS LAW. Edited by JAMES W. EATON, Esq., and H. NOYES GREEN, Esq. Albany, New York. 1897. Matthew Bender, Publisher.

The Negotiable Instruments Law, drafted by the Committee on Commercial Law (appointed by the Conference of Commissioners on Uniformity of Laws), and adopted by the Legislatures of the States of New York, Connecticut, Colorado, and Florida, has again been edited and annotated. The general outlines of the statute follow very closely those of the English Bills of Exchange Act, a codification of the common law, and the changes therefrom are due largely to the development which has taken place in the commercial law of the several states. The changes from the common law are carefully noted by the editors, so that the work presents in brief space a review of the whole subject of bills and notes, which will be found useful as well in those states where the act has not been adopted as in those where it has become a part of the statutory law.

A TREATISE ON THE LAW OF INDIRECT AND COLLATERAL EVIDENCE. By HON. JOHN H. GILLETT, Judge of the Thirty-first Judicial Circuit of Indiana. Indianapolis and Kansas City: The Bowen-Merrill Company. 1897.

The work of Hon. John H. Gillett embraces the subjects treated by the older text writers under Admissions, Confessions, Declarations, Hearsay, Custom and Usage, *Res Gestæ*, and Rumor and General Reputation. These are all treated in a scholarly and scientific manner, the leading American cases are discussed, and the principles deduced from them are clearly stated. Its scope naturally excludes such questions as Presumptions, Primary and Secondary Evidence, Oral Evidence to Affect Written Instruments, Judicial Notice and Competency of Witnesses. The foot-notes contain cases from all the states, and numerous British decisions as well. In this respect the work is exhaustive. A copious index facilitates the ready reference, so valuable to the practitioner, and the style is such as to make the book attractive to the student.

The first chapter treats of Admissions as Evidence, and contains an interesting discussion of the much argued question—whether or not an admission of the contents of a document is primary evidence thereof. The subjects of admissions by persons jointly interested, by predecessors in title to a chose in action, and by agents, are also skillfully handled. The chapter is made to include so-called admissions by co-conspirators, and this may be considered unfortunate as an arrangement, since such declarations are admissible only when in the nature of acts in furtherance of the common purpose, and not when merely narrative statements in the nature of admissions, and hence it would seem more logical to treat of them under the *Res Gestæ* Rule, or by analogy to it. In fact, the learned author recognizes this analogy, and treats of conspiracies to defraud creditors, declarations by a grantor after the grant, where the sale is alleged to be in fraud of creditors, and the allied topics under the heading *Res Gestæ*.

The chapter on "Collateral Evidence" covers a number of subjects, treated by other writers, under miscellaneous heads, and includes, among others, the following: "Similar, but Unconnected Facts," "Rules as to Remoteness of Relevant Facts," "Motive, Preparation, Subsequent Conduct, and Facts Necessary to Explain or Introduce Relevant Facts." There is also a scientific discussion of the "Spark Cases;" *i. e.*, suits for damage by fire started by sparks from locomotives, and an analysis of the cases in which the right to compel a party litigant to submit to a personal examination has been adjudicated, which shows a thorough mastery of this much mooted subject. In this chapter we also find a discussion of questions relating to Corroboration of Witnesses, Right to Prove Contradictory Statements, Cross-examination, and other topics which seem to relate to the Examination of Witnesses and Procedure, rather than to Collateral Evidence.

The subject of Entries in Shop Books is treated in the chapter on "Declarations," but the author recognizes the close relation which the rules governing their admission bear to the *Res Gestæ* Rule, and defends the American cases, which have produced the modern extension of the rule admitting such entries, by analogy to *Res Gestæ*.

The most interesting chapter, however, is the one devoted to the consideration of the *Res Gestæ* Rule. The leading cases on this subject are carefully analyzed and assimilated, and the resulting principles are stated in a manner which proves a thorough grasp of the subject. The treatment includes, in addition to subjects strictly classed as *Res Gestæ*, Declarations Showing State of Mind or Body, and Declarations of a Grantor who has Sold in Fraud of Creditors, as well as a sound discussion of the rule as to the admissibility of exclamations of by-standers when offered as part of the *Res Gestæ*. As a whole the work is satisfactory, and cannot fail to be of service to both lawyer and student, and, moreover, it has kept well within its limits—a rare virtue in the modern law book.

W. N. L. W.

A HANDBOOK OF THE LAWS OF PENNSYLVANIA OF 1897. Edited by LINCOLN L. EYRE, LL.B., of the Philadelphia Bar. J. L. H. Bayne. 1897.

This book is of especial interest and value to Pennsylvania lawyers, being a compendium of the recent Acts of the General Assembly of that State. It is divided into two parts.

Part I. contains acts of general application and importance, and Part II., acts of restricted application, or secondary importance. Each act is accompanied by its legislative number, and also the date upon which it was signed by the Governor. There is also a complete index of all laws contained in the book, by reference to their legislative numbers, thus enabling the reader to find them also in the Pamphlet Laws.

The book should be of great value to the active practitioner.

H. W. M.

FAMOUS LEGAL ARGUMENTS. By MOSES FIELD. Rochester, N. Y.: E. J. Bosworth & Co. 1897.

Mr. Field has collected in this volume a number of speeches of those lawyers whose learning, legal reasoning, and eloquence have made them famous in the history of the law. Although most of the speeches are accessible, if the reports of the cases, or the special volumes in which accounts of all famous cases have been published, are consulted, yet this book is very convenient to have at hand, to read at leisure, and to compare the various methods of style and argument employed. Moreover, since few of the speeches are of a technical nature, or deal with abstruse questions of law, the book will be of interest to those laymen "who delight to peruse legal

literature." Among the most famous arguments presented are those of Daniel Webster, in the trial of Francis Knapp (a portion of which speech is familiar to all school boys of elocutionary aspirations); of John Philpot Curran, in the case of *Rex v. Drennan*, and of William A. Beach, in the well-known case of *Tilton v. Beecher*.
A. E. W.

HANDBOOK OF THE LAW OF EQUITY PLEADING. By BENJAMIN J. SHIPMAN. Hornbook Series. St. Paul, Minn.: West Publishing Company.

This work is a very complete and logical analysis of one of the most important branches of the law, clear and concise to a high degree, like all the other books of this series. The sequence of topics could not be improved upon. Nearly two hundred pages, treating of "Bills in Equity," cover that comprehensive subject exhaustively, yet without once allowing the reader to lose his bearings among the multitudinous divisions and subdivisions. The chapter on "Proceedings in an Equitable Suit," intended chiefly for the student, "to state and explain what may or must generally occur in the conduct of an equitable suit from its commencement to and including the rendition and enforcement of the decree," is an excellent preface to the study of the Pleadings in detail.

To say that the book is essentially a reproduction of Story's masterly treatise on the same subject (which the author in his preface acknowledges to be the chief source of his material) will in no wise lessen its value. Its presentation of the law, as it now exists, and its original division of the subject and method of treatment, give it a value all its own.
M. H.

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SCHUYLER AGAINST CURTIS AND THE RIGHT TO PRIVACY.

The case of *Schuyler v. Curtis*,¹ is of so novel a character that in spite of the numerous comments which were made upon it both in the legal periodicals and the daily newspapers, when the final decision was rendered two years ago by the Court of Appeals, I shall venture, even at this late date, to discuss just how far that decision went and particularly what the opinion of Judge Peckham did not decide. Indeed, such a discussion seems especially useful, since the scope of the opinion in the Court of Appeals has been often misunderstood.

Schuyler v. Curtis was a suit brought by Philip Schuyler, the nephew and stepson of Mary Hamilton Schuyler and the authorized representative of all her immediate relatives, against the "Woman's Memorial Fund Association," a voluntary unincorporated association, to enjoin the members of it from making a statue of Mary Hamilton Schuyler or from causing it to be exhibited at the World's Fair. The avowed object of

¹ 147 N. Y. 434.

the association was the completion of two statues to honor "Woman as the Philanthropist" and "Woman as the Reformer" at the Columbian Exposition in 1893.

The association solicited subscriptions to promote this object, and employed Hartley, the sculptor, to make an ideal statue of Mrs. Schuyler as "The Typical Philanthropist." The association had also undertaken a statue of Susan B. Anthony to be designated "The Representative Reformer," and had announced the intention of placing the statue of Mrs. Schuyler on exhibition as a companion piece to it, although Mrs. Schuyler took no interest in the woman's rights movements, had no sympathy with them, and would have objected to having her name coupled with that of Miss Anthony.

Neither the art association nor any of the members of it had ever asked any of the relatives of Mrs. Schuyler for permission to make or exhibit an ideal statue representing her. Upon learning of the proposed statue her relatives at once objected to it, and in a polite letter by Philip Schuyler, requested the association to abandon the project. Mr. Schuyler wrote:

"Mrs. Schuyler, though taking her share with others in the philanthropic work of her day, is in no sense the typical philanthropist, and to place her in such a position is to invite public criticism of a sort which has already been made in the press.

"In behalf of her family, whose sentiment on this subject is conveyed in this letter, I respectfully request that the project, so far as she is concerned, be abandoned."

The association formally refused to abandon the project of the statue in an official letter to Mr. Schuyler, and denied the right of Mrs. Schuyler's relatives to be consulted in the matter. The point of view of the association is perfectly illustrated by extracts from this extraordinary document. In speaking of Mrs. Schuyler the letter says:

"Her character, her work, her life, belong to those who sympathize with culture, with art, philanthropy and reform. In so joining 'the choir invisible whose music is the gladness of the world' she belongs to all who live after her. As our poet Halleck says of one dead: 'For these are freedom's now

and fame's . . . ' As Emerson says of a famous character :
' Having neither wife nor child, father or mother, every one
who thinks is his child, and every one who receives his inspira-
tion is his descendant.'

" For these reasons we cannot believe it is our duty to the
public, to the cause of free art education, or to ourselves to
comply with the request to have the project to memorialize
Mary M. Hamilton Schuyler abandoned.

" We therefore will continue our efforts and ask subscrip-
tions from all who are in sympathy . . . "

How far the contention that Mrs. Schuyler ever became a
public character was from the truth can be seen from the follow-
ing testimony (given at the trial) of those who knew her best :

" She was a singularly sensitive woman ; and while quite
willing to do good deeds, she was of a very retiring nature
and was most anxious to keep her name, as many people of
course are, from the public prints.

" . . . She was a woman of great charm and a woman of
great ability ; everybody respected her ; everybody loved her ;
she was in no sense a woman before the public ; she was
interested in her charities just as hundreds of other ladies are,
and she gave a part of her life to them."

Mr. Justice Morgan J. O'Brien, who granted the injunction
pendente lite against the making or erecting of a statue, stated
the real facts of the case when he said :

" It has not been shown that Mrs. Schuyler ever came
within the category of what might be denominated public
characters:

" She was undoubtedly a woman of rare gifts and of a broad
and philanthropic nature ; but these she exercised as a private
citizen in an unobtrusive way."

The trial court made the injunction permanent and used the
following language in its findings : " That the acts of the
defendants . . . have exposed the name and memory of
Mary M. Hamilton Schuyler to adverse comment and
public criticism of a nature peculiarly disagreeable to
her relatives, and have caused disagreeable notoriety for
which they are in no way responsible . . . That annoyance

and pain have been caused thereby to the plaintiff and to the immediate relatives of the said Mrs. Schuyler, and that he and they have been and are greatly distressed and injured thereby and by the notoriety incident thereto; and that such notoriety and adverse comment and criticism are wholly due to the unauthorized acts of the defendants.

"That the acts of the defendants . . . constitute and are a continuing injury to the plaintiff and to the . . . relatives of . . . Mary M. Hamilton Schuyler; that they have no adequate remedy at law for the redress of the injuries and wrongs complained of . . . and that great and irreparable injury will be caused to the memory of . . . Mrs. Schuyler and to her surviving relatives unless the defendants be enjoined from the further prosecution of the acts so complained of . . ."

The court found as conclusions of law:

First: That the acts of the defendants were an unlawful interference with the right of privacy.

Second: That the surviving relatives of Mrs. Schuyler were specially injured thereby.

Third: That the plaintiff was entitled to judgment perpetually enjoining the defendants from making a statue of Mrs. Schuyler in any form or from causing it to be exhibited.

The judgment of the trial court was affirmed by the Supreme Court at General Term, and when the case came before the Court of Appeals the merits had been passed upon by six justices of the Supreme Court. Three of them had written careful opinions in which the merits of the plaintiff's right were fully discussed, and all had, without hesitation, held that the plaintiff's right of privacy had been infringed and supported the injunction.

In the Court of Appeals, however, the judgment was reversed and the injunction dissolved. Fortunately for the Schuyler family, the World's Fair had long passed, and there was no practical danger that the defendants would ever erect a statue of Mrs. Schuyler. Judge Peckham, who wrote the opinion in the Court of Appeals, stated the grounds upon which the court based the reversal in his own characteristically forceful terms:

"Whatever right of privacy," he says, "Mrs. Schuyler had, died with her. Death deprives us all of rights in the legal sense of that term, and when Mrs. Schuyler died her own individual right of privacy, whatever it may have been, expired at the same time. The right which survived (however extensive or limited) was a right pertaining to the living alone. It is the right of privacy of the living which it is sought to enforce here. That right may, in some cases, be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, not that of the dead, which is recognized . . .

"We cannot assent to the proposition that one situated as the plaintiff in this case can properly enjoin such action as the defendants propose on the ground that, as a mere matter of fact, his feelings would be thereby injured. We hold that in this class of cases there must in addition be some reasonable and plausible ground for the existence of this mental distress and injury. It must not be the creation of mere caprice nor of pure fancy nor the result of a supersensitive and morbid mental organization dwelling with undue emphasis upon the exclusive and sacred character of this right of privacy . . . A proposed act which a court will enjoin because it would be a violation of a legal right must, among other conditions, be of such a nature as a reasonable man can see, might and probably would cause mental distress and injury to any one possessed of ordinary feeling and intelligence situated in like circumstances as the complainant, and this question must always to some extent be one of law. If the circumstances be such that it is to a court inconceivable that the feelings of any sane and reasonable person could be injured by the proposed act, then it is the duty of the court to say so and to refuse an injunction which would prevent its performance.

" . . . We think that so long as the real and honest purpose is to do honor to the memory of one who is deceased and such purpose is to be carried out in an appropriate and orderly manner by reputable individuals and for worthy ends, the consent of the descendants of such deceased person is not

necessary and they have no right to prevent for their own personal gratification any action of the nature described."

Judge Gray wrote a dissenting opinion and said among other things:

"I must emphatically dissent from the decision of this court that there was no ground shown in this case for the equitable relief which was granted below. That a precisely analogous case may not have arisen heretofore in which the peculiar power of a court of equity to grant relief by way of injunction has been exercised, furnishes no reason against the assumption of jurisdiction . . .

"It seems to me clear that the jurisdiction of equity is not made to depend upon the existence of corporeal property, and that it is exercised whenever the complainant establishes his claim to the possession of exclusive personal rights and their violation in definite ways for which an action at law cannot afford plain and adequate redress. That is the case here . . .

"However opinions may differ with respect to the substantial injury to the feelings of Mrs. Schuyler's relatives, *we have the finding that it was in fact caused* and we should not say that it was merely fanciful. The theory of the case which calls for equitable relief is not that of a mere protection to wounded feelings, but the protection of a right which those who represent the deceased have to her name and memory as a family heritage and which had not become the public property. Why is that not a legal and exclusive interest and why are its possessors not entitled to be protected by the law from a notoriety which invites public criticism of the memory and reputation of the deceased relative?"

I have given a very full statement of the facts of *Schuyler v. Curtis* because a knowledge of them is necessary to a proper understanding of the attitude taken by the Court of Appeals and the real scope of Judge Peckham's opinion.

From these facts and the opinion, I think it is not an exaggeration to say that the decision of the Court of Appeals enunciates no legal principle whatever. The six judges in the court below had decided that the plaintiff had a right of privacy and that the conduct of the defendants was such as to

cause annoyance and pain to the plaintiff and to invade that right of privacy. The Court of Appeals did not deny the existence of the right, but simply held that they had the power as an ultimate question to decide whether the conduct of the defendants had really been sufficiently annoying to the plaintiff to deserve judicial attention. The court answered the question in the negative and in spite of the solemn finding of six judges of the Supreme Court, evidently concurred in by Judge Gray to the effect that the defendants had subjected the name of Mrs. Schuyler to public comment and disagreeable notoriety, and had caused annoyance and pain to her relatives, nevertheless held that it was "inconceivable that the feelings of any sane and reasonable person could be injured by the proposed act."

It is thus evident that the Court of Appeals, whatever dicta it may have indulged in, really reversed the case, not because of any theoretical difficulty with the plaintiff's claim, but because of the triviality of his grievance. "*De minimis non curat lex*" was the real ground of the decision.

The state of the law then seems to be this: The Supreme Court of New York has asserted the existence of a right to privacy in three well considered opinions.¹ Judge Gray has strongly reaffirmed the existence of such a right in his dissenting opinion in the Court of Appeals when the injunction in *Schuyler v. Curtis*² was dissolved by that tribunal and the majority in the Court of Appeals, while refusing to pass upon the general principle which the plaintiff in that suit sought to maintain, has in no wise, either directly or by implication, denied the existence of a right to privacy.

There is, so far as I have discovered, no decision against the existence of the right to privacy unless it be *Murray v. Lithographing Co.*,³ decided by the Special Term of the Court of Common Pleas of New York City, which was a decision by a single judge of a court of inferior jurisdiction.

¹ *Schuyler v. Curtis*, O'Brien, J., 15 N. Y. Supp. 787; *Schuyler v. Curtis*, Van Brunt, P. J., 64 Hun. 394; *Schuyler v. Curtis*, Ingraham, J., 24 N. Y. Supp. 309.

² 147 N. Y. at p. 452.

³ 49 Alb. L. J. 287.

The case of *Cortiss v. Company*¹ has no direct bearing on the question in *Schuyler v. Curtis* because the suit was there by the relatives of a famous inventor, and it was held that a public character surrendered his right to privacy.

So far then as the few cases go which are directly in point, there is a right to privacy possessed by every one. The question remains whether these cases are sufficiently consonant with the principles of the common law to be generally followed.

I could not hope, within the limits of this article, to discuss the various legal analogies invoked on behalf of the plaintiff in the Schuyler case in order to establish the right to privacy. Many of them were borrowed from the able article by Messrs. Warren and Brandeis, entitled "The Right to Privacy," published in the *Harvard Law Review*, Vol. IV, p. 193. Indeed, the authors of that article may flatter themselves with having pointed the way for both court and counsel in the Schuyler case. Their position has been controverted by Mr. Herbert Spencer Hadley in the *Northwestern Law Review*, Vol. III, p. 1, in a careful and logical article which doubtless carries complete conviction to some minds. If one is inclined to be very strict in adherence to the letter of the law, and as it seems to me, with all due deference to Mr. Hadley, somewhat technical and narrow, Mr. Hadley's article will be convincing.

A great argument of those who deny the existence of a right to privacy is always based on expressions found in some of the cases that an injunction will only issue to protect property. But such expressions are misleading. The confusion arises, it is believed, from a misconception as to what is the real legal nature of *property*. Judge Selden defined the meaning of property very accurately, as follows:

"Property is the right of any person to possess, use, enjoy and dispose of a thing. The term, though frequently applied to the thing itself, in strictness means only the *rights of the owner* in relation to it."²

This distinction between the object itself and the legal rights

¹ 57 Fed. Rep. 431; 176 64 Fed. Rep. 281.

² *Wynchamper v. People*, 13 N. Y. 433; *Eaton v. R. R. Co.*, 51 N. H. 511.

pertaining to it is referred to in the opinion of the learned referee, in *Matter of Beckman Street*, as follows :

"The dividing line between property as a thing objectively appropriated by a person, and a personal right as subjectively belonging to a person, is not always entirely distinct :"

In other words, the only scientific conception of property is not that of a horse, or a piece of land, or any object ; but it is that of a bundle of legal rights—"indefinite in point of use, unrestricted in point of disposition, over a determinate thing," as Austin puts it.¹

It is certain that equity will protect numerous rights which are not sufficiently extensive to be denominated property ; for example, the rights of a sender of a letter do not fulfill the conditions of the definition of property just given ; for they are neither "indefinite in point of user," nor "unrestricted in point of disposition." Indeed, there can, strictly speaking, be no property in a letter as such. It has been held that an indictment will not lie for larceny of a letter : *Payne v. People*, 6 Johns. 103 ; that private letters are not assets in the hands of an executor which he may liquidate : *Eyre v. Higbee*, 35 Barb. 502 ; that the writer of a letter cannot retain it even if he have got it back fairly ; but the receiver may maintain *detinue* for the paper : *Oliver v. Oliver*, 11 C. B. U. S. 139 ; and that the writer of a letter cannot compel the recipient to give it up : *Grigsby v. Breckinridge*, 2 Bush (Ky.), 480. In short, the only right recognized in the sender of a letter is to prevent its publication. Equity will protect that right, because there is no way in which it can be adequately protected at law.

That equity will protect the single right to prevent publication in the case of letters shows conclusively that the courts recognize the absurdity of refusing to protect one right, because the person asking for relief has not others accompanying it, or because that right is not related to the ownership of a tangible object.

The things which ordinarily need protection are, undoubt-

¹ 4 Bradford, New York Surrogate, Appendix, p. 516.

² Jurisprudence, Lect. 47.

edly, even nowadays, *physical objects* capable of ownership. In early times nothing else was protected, because nothing else was understood or valued. But as civilization has advanced, the Court of Chancery has kept pace with the needs of the time, and always has protected a real *substantial right*,—oftentimes calling it *property*, because, ordinarily, subjects of litigation were tangible objects, in which there was a right "indefinite in point of user;" but, yet, never failing to give relief, however far the right in the particular case might be from the full ownership of a *physical object*.

It is thus evident, as the learned authors of "The Right to Privacy" say, that:

"The legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are . . . but instances of a general right of privacy, which, properly understood, afford a remedy for the evils under consideration."

It is undoubtedly, however, still frequently said that a court of equity can interfere by injunction only where a right of property has been invaded. Mr. Hadley, in the able article already mentioned, made this very point one of his two principal reasons for denying the existence of the right to privacy for which I am here contending.

In disagreeing with him I am not consciously, at least, explaining the results reached in the decisions by my own reasons, and disregarding the language of the judges, or, to use the words of a learned legal critic, "treating the rulings of the court as the utterances of Balaam's ass, absolutely true, but not presupposing any conscious intelligence in the creatures from whom they proceed." It cannot be denied that in a few cases the champions of the right to privacy have claimed that the court, in allowing an injunction on the ground that a right of property was involved, has reached the right result by wrong reasoning. But in numbers of cases the judges have allowed an injunction where they have either **emphatically** declared, or tacitly admitted, that the right infringed was not a property right within the usual meaning of that term.

Particularly has this been true in the cases where a person

has been allowed to enjoin the mutilation or removal of the body of a deceased relative, or to sue at law for the consequent damages. These cases certainly go to show that an invasion of a property right is not the test of equitable interference, for there is at common law no property in a dead body.¹

In fact, the principal difficulty in establishing the existence of the right to privacy really lies not in the mere belief than an injunction must operate upon property rights, but upon the half conscious further belief that all legal rights must operate upon tangible objects and be readily measurable in dollars and cents. Two recent decisions answer most conclusively this fallacious idea. Both these cases were actions at law by a wife for the dissection of the body of her deceased husband by physicians, without her consent, and in both, in accordance with the settled law of this country, an injunction would have been granted to protect the wife's legal right of sepulture.

The following language of Justice Mitchell, in *Larson v. Chase*,² the first of the two cases I have referred to, throws light upon the whole subject discussed in this article and shows an instance where mental annoyance and distress are the sole basis of a right of action :

"There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation. This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery could be had for mental suffering, placing it on the ground that mental suffering as a distinct element of damage is never a proper subject of compensation, when the correct ground was that the act complained of was not an infraction of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act . . . But where the wrongful act constitutes an infringement on a legal right mental suffering may be recovered

¹ *Matter of Beckman Street*, 4 Bradford (N. Y.), 503-532; *Mitchell v. Thorne*, 134 N. Y. 536; *Foley v. Phelps*, 1 App. Div. 551; *Snyder v. Snyder*, 60 How. Pr. (N. Y.) 368; *Weld v. Walker*, 130 Mass. 422; *Pierce v. Proprietors*, 10 R. I. 227; *Wynkoop v. Wynkoop*, 42 Pa. 293.

² 47 Minn. 307.

for if it is the direct, proximate and natural result of the wrongful act. It was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental, as, for example, an assault without physical contact. So, too, in actions for false imprisonment where the plaintiff was not touched by the defendant, substantial damages have been recovered, though physically the plaintiff did not suffer any actual detriment."

And Justice Patterson of the New York Supreme Court uses similar language in the still more recent case of *Foley v. Phelps*.¹

"But we are not disposed to put the right of the plaintiff to maintain this action on the ground of a property right in the remains of her husband, nor do we think that the discussion is properly placed when it is rested exclusively upon that proposition. Irrespective of any claim of property, the right which inhered in the plaintiff as the decedent's widow, and in one sense his nearest relative, was a right to the possession of the body for the purpose of burying it; that is, to perform a duty which the law required some one to perform, and which it was her right by reason of her relationship to the decedent to perform. . . . If this right exists, as we think it clearly does, the invasion or violation of it furnishes a ground for a civil action for damages. It is not a mere idle utterance, but a substantial legal principle, that wherever a real right is violated a real remedy is afforded by the law. A right to vote can in no sense be called a pure right of property; it is merely a personal right; yet who would now contend that a person obstructing a voter's right or preventing his voting would not be, irrespective of any statutory enactment, liable, even if the candidate of the choice of the person thus obstructed was elected."

To hold in the face of these decisions that there can be no invasion of the right to privacy, because no right of property in the strict sense of the term is in dispute, and that consequently no injunction can issue to prevent repeated and

¹ 1 App. Div. 451.

continued violations of such legal right, seems, to say the least, technical and conservative.

To answer briefly, then, the objection of Mr. Hadley that an injunction cannot be granted to prevent the invasion of the right of privacy, because no right of property is involved, I would say that a legal right of property is not a *sine qua non* to the granting of an injunction. To answer the general objection that mental distress is never a ground for an action, I would deny the truth of such an assertion. If no legal right is infringed, mental suffering will not support an action, but neither would physical suffering. The question is simply—is there a legal right to privacy? If there is, the objections as to the mode of protecting it disappear.

Mr. Hadley further says that no remedy by injunction should be given for invasion of privacy, because, where the invasions of privacy have gone so far as to get into the field of libel, they cannot be enjoined. The question as to whether a libel could be enjoined long remained open in England owing to conflicting decisions, until finally the present statute was passed, authorizing an injunction in certain cases. But the whole subject of libel is, for historical reasons, *sui generis*. English history is filled with attempts by one political faction to use the action of libel as an engine of oppression to the other. Hence there has been a constant tendency in that action in every Anglo-Saxon jurisdiction to protect the defendant and to restrict the remedies of the plaintiff in a way that can only be explained upon *historical grounds peculiar to libel itself*.

Moreover, there is an adequate remedy for invasions of privacy which are libellous, by means of the civil and criminal actions for libel. The interposition of chancery is, therefore, in these cases unnecessary, and, for the purely historical reasons already mentioned is, in some jurisdictions at least, without warrant. No reason can be given why chancery should refuse to protect the privacy of individuals in cases where the invasion is not libellous, because it cannot protect it where the invasion is libellous, unless it be to preserve the symmetry of the law at the expense of the very ends for which

every civilized system of law works. It is submitted that the historical, and, as it were, piecemeal growth of the common law, has naturally, if not necessarily, produced many inconsistencies in the system, and that inconsistency with some other branch of the law is, therefore, not a conclusive argument against a result practically very desirable. In fact the inability of a court of equity to enjoin a libel seems exceptional and inconsistent, and the protection given to the right to privacy by the court in the Schuyler case, whereby alone that right can be of any real avail, natural and sensible.

The practical desirability of recognizing and protecting the right to privacy is so well shown by the learned writers in the *Harvard Law Review*, already mentioned, that I quote what they have written without further comment. They say :

"Recent inventions and business methods call attention to the next step which must be taken for the protection of the person and for securing to the individual what Judge Cooley¹ calls the right 'to be let alone.' Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons. . . .

"Of the desirability—indeed the necessity—of . . . protection (of the right to privacy) there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life attendant upon advancing civilization have rendered necessary some retreat from the

¹ Cooley on Torts, 2d Ed. p. 29.

world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress far greater than could be inflicted by mere bodily injury."

If, then, the protection of the privacy of the individual is practically so desirable, why should the law hesitate to give that protection? I believe it appears from the foregoing considerations that excellent legal analogies can be invoked in support of such a right and none of the arguments against it are at all convincing. In view of these facts I cannot but confidently look to see the principles laid down by the lower courts in *Schuyler v. Curtis*, generally followed.

The limits of a right which has been so little defined by judicial decision are at present of course vague, and it can only be said that the limits of this right, like the right of personal liberty, of which it is an extension if not a part, must be determined by the relative demands of individual freedom and public convenience or necessity.

Augustus N. Hand.

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RAILROAD REORGANIZATION AGREEMENTS.

During the past four years of business depression no branch of the law has been brought more prominently before the public than that which governs corporate, and particularly railroad securities. The inability of the great railroad companies to meet the recurring interest on perhaps one-third of the total outstanding indebtedness, has resulted in their creditors asking for the assistance of the courts, and we have become very familiar with the spectacle of receivers appointed by the courts administering the affairs of many of the leading railroads. It is not my purpose, within the limits of this brief article, to discuss the manner of the appointment of receivers and to inquire whether their administration has been, to use an analogy from a related branch of the law, for the benefit or for the detriment of the corporate creditors. I desire simply to call attention to some of the striking features of the so-called reorganizations, by which alone it has been found possible to terminate the receivership and to restore the property to the control of its original owners, viz., the bondholders and stockholders.

It is fair to observe at the outset that a receivership, and particularly a railroad receivership, is in itself a direct invitation to some such agreement on the part of the company's creditors. The attitude of a court, upon assuming control of such a property, must necessarily be a willingness to preserve the assets from execution and sale for a reasonably short time only, and if, at the expiration of such reasonable time, it is evident that the company is unable to meet its current obligations, the court will then not only permit but urge the holders of the unpaid securities to insist upon their legal rights, usually by a foreclosure sale, unless all parties in interest can agree upon some plan by which the road can be placed upon a solvent, or at least an apparently solvent basis; in other words, unless a reorganization agreement can be framed and carried out. More than once during the pendency of the recent receivership

of the Philadelphia & Reading Railroad Company (which lasted over four years) it was intimated by the court that the court would have itself to terminate the receivership, unless some speedy steps were taken by the interested parties.

As just indicated, there are ordinarily two alternatives for security holders during the receivership: either, first, the mortgage creditors, whose interest is unpaid, may stand upon their strict legal rights and press for a foreclosure and sale, thus practically cutting out the inferior mortgage creditors, if any, and the general creditors and stockholders; or, secondly, rather than lose the privileges conferred by a charter, which would be forfeited by such judicial sale, or for some other reason, the creditors may agree upon some plan of reorganization, which includes among other features (1) the raising of a fund to meet necessary expenses (including especially expenses incurred during the receivership) by assessments upon the various classes of security holders, the amounts increasing in proportion as the securities are less valuable, and (2) a scaling down, whether of principal of security or rate of interest thereon, or both, the object, of course, being so to reduce the fixed charges that they can be met by the prospective income. All this is familiar to layman as well as lawyer; the innovation, however, which has recently been introduced, is the combination of these two alternatives, by which the reorganizers practically say to the inferior creditors: "Either you will join in our plan, or we will obtain a decree of foreclosure, as a result of which you will lose your investment altogether." Some of the features of this position have seemed to the writer so important as to deserve special attention.

Here, again, however, before coming to the real question, a preliminary observation is needed in order to avoid any misconception. There is and there can be absolutely no legal objection to the first mortgage creditors taking precisely the position thus outlined. As they have a legal right to ask for a foreclosure, if the case presented were the simple one of their threatening to exercise this right, unless certain conditions, however unreasonable, are complied with, no one could object; the legal doubt that arises in practice is based upon the fact

that owing to the complexity of the situation the reorganizers must to some extent rely upon the assistance of the court in order to accomplish their purpose. The grave doubt that arises is whether the court ought, either nominally or actually, to give assistance, and if so, upon what terms; and it is believed that the questions can be most clearly considered, by hastily surveying them in the form which they took in the cases of *Platt v. Philadelphia & Reading Railroad Co.*, C. C. U. S., Eastern District of Pa., April Sessions, 1893, No. 1, in equity; *Pennsylvania Company for Insurances on Lives and Granting Annuities v. Philadelphia & Reading Railroad Company et al.*, C. C. U. S., Eastern District of Pa., April Sessions, 1895, No. 9, in equity, and *Kurts v. Philadelphia & Reading Railroad Company et al.*, C. C. U. S., October Sessions, 1896, No. 3, in equity.

The Philadelphia and Reading Railroad Company was, on February 20, 1893, insolvent; on that day a bill was filed by Thomas C. Platt, a holder of certain third preference income bonds, averring default in payment of interest due on these bonds, refusal of the trustee either to foreclose the mortgage securing them, or to take possession of and sell the mortgaged premises, and praying in the usual manner that receivers be appointed to preserve said property, pending foreclosure and sale. This bill possessed all the characteristics of a strictly foreclosure bill, but inasmuch as it contained a prayer for the appointment of receivers of *all* the assets of the company, receivers were appointed by the court for *all* the assets—a point of some importance, as will hereafter appear—and the receivers did enter upon and take possession of all the assets of the company, including a considerable amount of property which was not covered by the mortgage which secured the third preference income bonds. Two years later, on March 2, 1895, a bill in equity was filed by the Pennsylvania Company for Insurances on Lives and Granting Annuities in the same court (as of April Sessions, 1895, No. 9, in equity), as trustee of the general mortgage and the first, second and third preference income mortgages, averring default in payment of interest on all these securities, and praying for a foreclosure and sale.

This bill has been expressly decided to be a foreclosure bill : 69 Fed. Rep. 482..

During this interval of two years several plans of reorganization had been proposed and discussed, but none had been adopted by the security holders, although one had arrived at such a point that the receivers took cognizance thereof to the extent of asking the leave of court to make certain payments therein provided for. On December 14, 1895, however, a "plan and agreement" was proposed, which was finally adopted and became operative by receiving the assent of the requisite number of security holders. It was proposed by the so-called Olcott Committee, which had originally been formed for the purpose of representing the general mortgage bondholders, but which now offered to give other security holders an interest in the proposed new company in consideration of the payment of the usual assessments. Admitting the theoretical right of the parties secured by the first mortgage to share their advantages with others—and, in so doing, to make their own terms—I desire to call attention to several incidents which seem to differentiate this case from the ordinary one, and to throw some doubt, at least, upon the validity of this reorganization.

In the first place, although the third preference income mortgage covered only a part of the property of the company, receivers had been appointed, upon application of a holder of third preference bonds, for the whole property. This was apparently beyond the jurisdiction of the court. In *Scott, Intervener, v. Farmers' Loan and Trust Co.*, 69 Fed. Rep. 17, a judgment creditor of the Northern Pacific Railroad Company applied to the court for leave to sell land of the company, which, though subject to the lien of his judgment and not subject to the lien of any mortgage, had, nevertheless, been taken possession of by the receivers, who refused to give him any satisfaction. The court was clear in its statement of his rights: "The jurisdiction possessed by a court of chancery to foreclose a mortgage and appoint a receiver for the mortgaged property pending the foreclosure, gives it no jurisdiction or power to seize or take into its custody or control,

through a receiver or otherwise, property of the debtor which is not covered by the mortgage." And the court granted Scott immediate relief. This decision is in accordance with the statement of the law contained in Gluck & Becker on Receivers, § 66: "The right of the mortgagees cannot extend beyond the property mortgaged, and the right of the receiver must necessarily have the same limitation." Nor is this distinction between mortgaged and unmortgaged assets in the hands of a receiver an unimportant one. In the Northern Pacific case the vast land grants to the company were unmortgaged, and in the Philadelphia and Reading case we may judge of the value of unmortgaged property by the following description of assets which are to be covered by the new general mortgage, though not included under the old one, and *a fortiori* under the preference income mortgage: "The new general mortgage will have a first lien upon a majority or more of the capital stock of various companies in the system owning 448 miles of railroad . . . These 448 miles embrace properties which are essential to the system, no part of which is covered by the present general mortgage. The securities thus to be pledged earned last year an income of \$585,000, of which \$448,000 was actually received by the Philadelphia and Reading Railroad Company in the way of dividends, the remainder being retained for betterments and working capital. The new mortgage will thus have the security of a vast amount of valuable property in addition to that afforded by the present general mortgage." It is, therefore, submitted, first, if the Platt bill was a foreclosure bill—as it appears to be in substance and in form, in spite of a very general prayer—the receivers appointed under it should have no right to possess the property not covered by the third preference income mortgage; and, secondly, if it can fairly be regarded as a general creditors' bill, the fact should not be lost sight of that, so far as unmortgaged assets are concerned, the receiver holds principal and income thereof for the equal benefit of mortgage and general creditors alike. Whether we rely on those cases which declare that the property of an insolvent corporation is a trust fund for the benefit of its cred-

itors (*Graham v. R. R. Co.*, 102 U. S. 148; *R. R. Co. v. Ham*, 114 U. S. 587), or on those holding that the claim of unsecured creditors amounts to an equitable lien (*Farmers' Loan & Trust Co.*, 45 Fed. Rep. 518), or no, it is perfectly clear that the court should, through its receivers, give no preference as to unmortgaged property to any class of creditors.

In the second place, let us look at the financial administration of the receivers. Their reports to the stockholders of their conduct of the road show that the average annual earnings of the company during the four years, 1892-5, were (about) \$10,700,000, while the average fixed charges for the same period, including interest on receivers' certificates and car trusts, were (about) \$10,000,000—in other words, that the road was in a solvent condition. Why, then, was the interest on the general mortgage not paid? Because, during the receivership, \$3,600,000 was spent for betterments and equipment, with respect to which three circumstances should be noted: (1) That this sum was in considerable part made up of income from unmortgaged assets; (2) That, while not paid in the form of interest to the mortgagees, it nevertheless redounded to their benefit by increasing their security for the repayment of their principal; and (3) That the non-payment of interest was in accordance with the wishes or, at least, not against the wishes of the committee, which, all the while, was representing the interests of the general mortgage bondholders. It is not intended to intimate by this assertion that the committee was acting in anywise improperly or beyond its legal rights; on the contrary, it is believed that it was perfectly justified, both legally and morally, in awaiting its own time to foreclose, and in using the threat of foreclosure as a lash to bring junior security holders into its plan. The fact, however, is important, and the committee's appreciation of the situation is proved by the following quotation from its circular of September 19, 1894: "It is thus apparent that the Philadelphia and Reading Railroad Company has, during the past three years, earned the interest upon the general mortgage bonds, but the large car trust payments have made it impossible to pay the general mortgage interest during the receiv-

ership." We quote also from the plan of reorganization of December 14, 1895: "The security for the present general mortgage bonds is ample, but a reorganization has become necessary through the creation of debts, which have proved a drain upon the resources of the company and have necessitated a diversion of its income." Nor can the committee be justly charged with any effected concealment of its control of the situation, or of the means by which it proposed to carry its purpose into effect; its plan of reorganization begins with the statement that "a decree for the foreclosure of the general mortgage is expected shortly to be entered."

The rest of the "history of the case" need not detain us long. The decree for foreclosure, rendered necessary by the fact that all of the creditors were not parties to the plan of reorganization, was duly entered on the first day of May, A. D. 1896, which provided, in substance, that in default of certain payments therein specified on or before certain dates therein mentioned, the entire assets of the company should be sold in the manner therein provided for.

The real character of such foreclosure sales is generally known, and, indeed, has been judicially described by the court of highest authority in our own country. In *Canada Ry. Co. v. Gebhard*, 109 U. S. 527, Chief Justice Waite said: "It rarely happens in the United States that foreclosures of railway mortgages are anything less than the machinery by which the arrangements between the creditors and other parties in interest are carried into effect and a reorganization of the affairs of the corporation under a new name brought about." The reason for this was thus explained by Strong, J., in *Sage v. Railroad Co.*, 99 U. S. 334-340: "In such a case as the present the first mortgage bondholders are the only persons who can become parties, and they only because they need not pay their bid in cash." It is not denied, again, that the first mortgage bondholders have a perfect legal right to hold foreclosure proceedings as a whip over the junior security holders; but it is submitted that the court, conscious as it must be of the fact that its decree may be used simply as the machinery for forcing through, against dissenting security holders, some plan of

reorganization, should be very careful to see, first, that the parties praying for the decree are equitably as well as legally entitled to it, and, secondly, that the decree itself be so framed as to protect and further the rights of all parties in interest. The considerations have already been mentioned which bear upon the equitable rights of the first mortgage bondholders in this case. With respect to the decree itself it may be observed (1) that, although entered in proceedings instituted by mortgage bondholders, it ordered the sale as well of the unmortgaged assets of the company; and (2) that, as is the almost invariable practice in such cases, the parcels in which the property was to be sold were so grouped and arranged that it was almost impossible for any other independent bidder to estimate their value, so as to frame a bid—a circumstance which redounded to the advantage of the first mortgage bondholders (represented by the managers of the plan, who were authorized to pay for their bid by the deposit of bonds in their possession).

The sale thus ordered was not permitted to take place without an effort to forestall it on the part of those creditors who were not parties to the reorganization agreement. A bill in equity (to C. C. U. S., Oct. Sess. 1896, No. 3, in equity) was promptly filed by W. W. Kurtz, the holder of certain delinquent bonds of the Philadelphia, Reading and New England Railroad Company, payment of principal and interest of which had been guaranteed by the Philadelphia and Reading Railroad Company; an injunction against the sale was prayed for, and an elaborate argument had in which the validity of the reorganization was attacked and defended on very broad grounds. A decision on the merits would have been a very valuable addition to the legal literature on the subject, but unfortunately (from this view) the refusal of the injunction was based upon an agreement (not mentioned heretofore because of no general importance) which the court construed as a promise on the part of this class of creditors not to delay the sale.

The argument upon which the validity of the reorganization was chiefly attacked, was the broad proposition that a court of equity, whose maxim is "Equality is equity," cannot and

will not look favorably on a plan which gives certain of the creditors an opportunity to share in the new company (or, in other words, in the assets of the old company which have been bought in by the new, or transferred to it), while refusing the same privilege to other creditors of equal equity. The first answer to this was, the trustee's right to foreclosure could not be affected by a provision in the reorganization agreement made a year after suit begun, and to which it was not a party, or by any policy indicated in that agreement or carried out in pursuance thereto; but as if fearing that the facts above recited, together with the fact that the trustee and the "managers" had been represented throughout by the same able counsel who had prescribed one harmonious course of action, might be construed an agreement in fact, though not in name, on the part of the trustee, it was further contended that the reorganization agreement was perfectly lawful, and that, therefore, an actual joinder in it by the trustee would not have constituted any objection to the decree.

It must be conceded that, admitting the undoubted right of the bondholders to foreclosure, the sale *might*, nevertheless, be rendered invalid by reason of a previous agreement for its purchase, provided that agreement was illegal. In *Railroad Co. v. Howard*, 7 Wall. 392 (1868), which is the first important case on the subject, a sale under a mortgage was held invalidated by a previous agreement between the mortgagees and the stockholders, under which the stockholders were entitled to a share of the proceeds of the sale—and this although the road was mortgaged so far above its real value that on a sale in open market it did not bring nearly enough to pay the mortgage debt. The proceeding was a bill in equity filed by the general creditors of the company who obtained a decree that that part of the proceeds of the sale which would have been received by the stockholders, should be paid to complainants. It was strenuously argued for appellants, that the agreement was simply a gift of the mortgagees to the stockholders, of which no one could complain; but the decree was affirmed by the Supreme Court, per Clifford, J., whose opinion was based upon the consideration that the capital stock of a corporation

is a trust fund for the benefit of its creditors, and that the stockholders can by no contrivance appropriate any part of it to their own use until creditors are paid. Whether regarded as an illustration of the trust fund doctrine, or simply as a case of fraud, the case was doubtless properly decided, and has been generally followed as an authority. It having been thus determined that a distribution of the proceeds of a sale to stockholders was illegal and the need still existing of a reorganization agreement which would confer some rights on the owners of the property, the plan now generally adopted was devised, to wit: of framing an agreement under which the assets of the old company should be bought in by a new company, in which new company all stock and bondholders of the old company should be allotted certain stocks or bonds, the amount depending on the relative value of the old securities and the amount of assessments paid by the owners thereof. This plan is well illustrated in *Pennsylvania Transportation Co.'s Appeal*, 101 Pa. 576 (1882). The Oil Creek and Allegheny River Railroad Company having defaulted in the payment of interest on its mortgage, its property was sold under a decree of foreclosure. The bondholders, stockholders and nearly all of the unsecured creditors had entered into an agreement which expressed their purpose to unite for the purpose of protecting their common interests, to buy in the property at the sale under the pending proceedings, and organize a new corporation in which all should have an interest. This plan was carried out, the property was sold, bought in by a committee, and the Pittsburgh, Titusville & Buffalo Railroad Company became the legal owner of the road. A bill in equity was filed by Pennsylvania Transportation Company (one of the few general creditors who did not participate in the reorganization, apparently because its claim was considered unjust by the old company) against the Pittsburgh, Titusville & Buffalo Railroad Company, praying that this sale be decreed fraudulent as to complainant and that the new company be ordered to pay the amount for complainant's judgment. Exceptions to the master's report recommending a decree granting the

prayer of the bill were sustained, the bill was dismissed and the decree dismissing the bill was affirmed by the Supreme Court, per Mercur, J. Two extracts from the opinion are quoted: "On the hearing in the present case before the master, it was urged that the default in the payment of interest on May 1, 1874 was not *bona fide*, but fraudulent, and that the default and sale were brought about with intent to defraud the appellant. The master found that these facts are nowhere charged in the bill, and are not sufficiently shown by the testimony." Again: "The argument is that a certain written agreement, entered into between the purchasers before the sale, changed the effect thereof,—in substance that it operated as a fraud on the appellant." After setting out the terms of the agreement: "What then was there illegal or invalid in so agreeing? It was not to depress the property or cause it to be sold for a sum less than its value, but to enhance it. It has been held that bondholders may unite for the purchase of the property: *Ketchum v. Duncan*, 6 Otto, 659; *Sage v. R. R. Co.*, 9 Id. 342. It is a fair and wise course for them to pursue to prevent a sacrifice of their property. If they may so unite, we see no valid reason why stockholders may not unite with them in a purchase at a sale made in good faith. They, as well as bondholders, are interested in protecting their property from sacrifice, and may resort to like lawful means to protect it." Another illustration of modern methods is *Smith v. Chicago & Northwestern Railway Co.*, 18 Wis. 17 (1864). An extract from the opinion of Paine, J., shows the ground of the decision. "The complainant avers that there being an outstanding mortgage to the trustees to secure the bondholders, an agreement was made between the company and the holders of the bonds secured by said mortgage, and said trustees, that a sale should take place on the mortgage 'for the benefit of said company, its stockholders and creditors; that there should be a reorganization of said company under another name, and that the stockholders of said mortgage company and unsecured creditors should become stockholders of said reorganized company, etc. It also avers that the sale did take place in pursuance of such agreement, and that the

purchasers reorganized 'said corporation under the name of the Chicago & Northwestern Railroad Company,' which is this defendant. The theory of the plaintiff is, that these allegations show that the present company is nothing but the old company under another name, and is, therefore, liable for the old debts. But we have come to the conclusion, that although the complaint says the agreement was that the old company should be reorganized, and that it was reorganized, yet it shows that a new company was to be and was organized."

The authorities cited sustain the following propositions: First, that a reorganization agreement, otherwise valid, cannot be defeated because it results in a sale of all the assets of the old company to a new company, and that the new company is not liable for the debts of the old: *Smith v. Chicago & Northwestern Railway Co., supra*. Not only so, but such a consummation is so necessary to the maintenance of railroad enterprises that statutes have been passed in many states expressly conferring upon purchasers at foreclosure sale the right to form a corporation which shall have the franchises of the old company: N. Y. Laws of 1850, Ch. 140, § 5, amended by Laws of 1854, Ch. 282, and N. Y. Laws of 1873, Ch. 710; also N. Y. Laws of 1874, Ch. 430; Beach on Railroads, §§ 766-7. Second, that the sale under the reorganization agreement may be disregarded by non-assenting creditors, provided the agreement is in the eyes of the law illegal: *Railroad Co. v. Howard, supra*. The difficulty that remains, however, and it is one which is not much cleared up by the decisions, is to determine when such an agreement is in the eyes of the law illegal. Some points are of course established; as, that the stockholders shall not be allowed to receive part of the proceeds of the sale to the detriment of any creditors (*Railroad Co. v. Howard, supra*), or, that an agreement by which the price obtainable at the sale should be cut down, is voidable by the creditors injured (*Pennsylvania Transportation Co.'s Appeal, supra*). These decisions can readily be complied with (1) by giving the stockholders only stock in the new company instead of cash, and (2) by bidding a large nominal sum which, though formidable in name, is easily accomplished in fact by paying in

first mortgage bonds, and it need hardly be said that no reorganization agreement could succeed unless it were agreed to by substantially all of the holders of such bonds. Two vital and unavoidable questions remain, however, and they formed the foundation of the argument in the Kurtz case; is the agreement illegal if (1) the sale was one that could have been avoided by the first mortgage bondholders had they adhered to their legal right to have the income paid to them and not expended upon new rolling stock (or otherwise), however needed? and if (2) an opportunity is not given to all the creditors to take part in the reorganized company?

With regard to the first point, perhaps it will be conceded that a needless sale is an illegal sale; the almost insuperable difficulty is to prove that it was needless in the face of abundant *bona fide* testimony as to the need of the diverting expenditures, the fact that these expenditures are made by receivers, possibly with the direct approval of the court, etc. It is submitted, however, (1) that a court should hesitate long before authorizing the diversion of funds from the payment of mortgage interest, remembering that practically such diversion simply adds to the security of the first mortgage bondholder, at the same time resulting in an increase of his claim, so that in case of foreclosure or reorganization the inferior or general creditors are handicapped to the extent of the sums diverted; and (2) that the court, though always favoring an equitable plan of reorganization, should carefully watch, lest its process be abused to aid in any plan which is inequitable—a thought which brings us naturally to the next point of invalidity, viz., is a scheme of reorganization illegal, because it denies a share to all of the creditors of the old company?

It is believed that this question has never been categorically answered by the courts, in spite of the fact that it is the all-important question in most reorganizations; at least an examination of the numerous recent authorities has not resulted in finding a single discussion. To be sure, in *Pennsylvania Transportation Co.'s Appeal*, *supra*, the agreement was sustained, though the plaintiff, at least, was not invited to participate, the court apparently being satisfied because "nearly all"

of the general creditors were allowed to come in ; but even here it must not be overlooked that the court refrained from directly upholding the position that is deducible from its decision, and also that the plaintiff's claim was there disputed by the old company, possibly on valid grounds, so that it did not come before the court in a favorable light. Apart from this decision, however, which may or may not be a precedent upon this question (especially in Pennsylvania courts), is it desirable that the courts should countenance any plan of reorganization which does not invite every creditor to participate ? The courts have declared their belief that reorganization agreements, while usually necessary and often not only desirable but indispensable, are susceptible of abuse, and have proclaimed that where they are used for a fraudulent purpose they will be held incapable to accomplish it. What is to prevent them from saying to the first mortgage bondholders : " Your interest is not paid ; you are legally and morally justified in asking for a decree of the court to aid you in the recovery of your money, and if you ask it for that purpose, you shall have it. But if you do not want the property actually sold, if you desire to retain your interest therein, and especially if you are willing and have agreed that so far as you are concerned the present owners may retain an interest therein, then we say to you that we will not, at your request, order a merely nominal sale unless you give a fair and reasonable opportunity to every creditor to retain his claim on the existing assets by conferring upon him an interest in the new company. We will not, either in fact or in name, permit a debtor so to transfer his property that he will retain the control thereof, while his creditors cannot lay hold of it."

It is to be observed that this is the practice in England. Prior to 1867 the affairs of a bankrupt railway were arranged by an Act of Parliament (*Cumberland Railway Co.'s Scheme*, L. R. Ch. 294), and it is believed that these acts uniformly recognize the principle about to be stated. By the Railway Companies Act, 1867, 30 and 31 Vict. c. 127, provision is made (*inter alia*) for " schemes of arrangements " between railway companies and their creditors. The scheme includes

a filing of the plan in court and advertisement thereof. When the plan is assented to by the holders of three-fourths in value of each class of creditors, and by the shareholders at an extraordinary meeting called for the purpose, application is made to the court for confirmation of the plan. This is done if the court be satisfied that "no sufficient objection to the scheme has been established," and the scheme thereupon becomes binding upon all parties interested, whether assenting or not. The act accomplishes two very important purposes: (1) It recognizes the right of the majority to rule, and thereby does away with a person who is extremely difficult to deal with, viz., a small minority creditor or bondholder, (*see Hollister v. Stuart*, 111 N. Y. 644, 659; *Shaw v. Railroad Co.*, 100 U. S. 605; *Gates v. Boston R. R. Co.*, 53 Conn. 333); secondly, and more to our present purpose, it places in the discretion of the court the approval of all reorganization plans, and, needless to say, that discretion may be and is used to protect the interests of all classes of creditors. Of course, such legislation is entirely out of the question in our own country, where both the United States and State legislatures are forbidden by constitutions to impair the obligation of contracts, and where, therefore, the mortgage creditor could neither be compelled to join in a reorganization nor be deprived of his right to apply for a decree of foreclosure: See *Canada Southern R. R. v. Gebhard*, 109 U. S. 527. It is submitted, however, that the English practice is not without its value for the courts of our own country; if the rule laid down by them is fair and equitable, and if it cannot be accomplished by statutory legislation here, is there not so much the greater reason for the courts of equity to extend their protection to those who certainly need it by declaring that to be a fraud in law, which is a great injustice in fact? Or, to put the other side of the case, what inequity or hardship can there be in compelling those who ask the court's aid to do equity to others? I know it will be answered that the court cannot inquire into the motives of a party who is asking for a decree to which he is legally entitled; granted—but is that any reason why the court should not take the agreement by which

that party has modified his legal rights, and declare that, as he now comes to carry out a plan not contemplated by law, he must satisfy the court that that plan is just and equitable? It would seem hard to find a more opportune occasion for the court of equity to have recourse to its old maxim.

(It is, perhaps, proper to add that some of the questions discussed may come before the court in *Kurtz v. Philadelphia & Reading Railroad et al.*, C. P. 2, Sept. Term, 1896, No. 408. This suit, which is the sequel of the Kurtz case above referred to, is a bill in equity directed mainly against the "reorganization managers," and praying that they account to complainant for the assets which came into their hands through the assessments which formed a part of the plan; in addition to the invalidity of the reorganization, and perhaps prior in importance to that, the argument is suggested that the reorganization managers become trustees of these funds for the relief of the stockholders, and that their duty as trustees will not be fulfilled unless all creditors are paid or allowed to participate, as otherwise the stockholders remain individually liable, by virtue of an amendment to its charter, for the debts of the Philadelphia & Reading Railroad Company. A demurrer has been filed to this bill, but no decision has been as yet rendered by the court.)

Reynolds D. Brown.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

In *First Nat. Bank of El Reno v. Salyer*, 50 Pac. (Okl.) 76, the bank asserted a preference against an assignee for the benefit of creditors as to certain property on which the bank had a chattel mortgage, which it had failed to record, in spite of a statute declaring unrecorded chattel mortgages void as against the creditors of the mortgagor. The bank replied upon the old argument that "the assignee took no higher rights nor better title than the assignor;" but the court properly replied that this rule could not be relied upon to validate a transaction which, but for the assignment, was unquestionably invalid by statute. This decision was reaffirmed upon a rehearing: *First Nat. Bank v. Salyer*, 50 Pac. 77, the court admitting that the common law rule was contrary, as well as the decisions under the United States Bankruptcy Act, but declaring that the effect of the local statute was to make the assignee a trustee for creditors.

Following *Bruner v. Bank*, 37 S. W. (Tenn.) 286 (1896), it is held in *Williams v. Cox*, 42 S. W. (Tenn.) 2, (1) that a depositor who deposits a check when the bank is known by its officers to be insolvent, can recover the proceeds if they can be identified; and (2) when the check was collected by a foreign correspondent bank after the failure of the first bank, it was its duty to transmit them intact to the receiver, and it will be presumed that this was done, and that the money which it retained to indemnify it against certain rediscounts was retained out of money collected before the failure.

Harris v. First Nat. Bank of Johnson City, 41 S. W. (Tenn.) 1084, merely reiterates the principle that a bank which receives a deposit under circumstances such as those detailed above will be compelled to refund. The transaction is voidable on account of the fraud, and the decision logically carries the principle one step further by holding that the deposit (in this case a certificate on another bank) could be recovered from a third bank, to which it had been forwarded as collateral

for a pre-existing debt, which is not enough to constitute the transferee a *bona fide* holder for value.

The Court of Chancery of Tennessee, following the trend of modern decisions, has held that a statute which provided that a state bank should not own real estate more than sufficient for the conduct of its business, unless taken in payment of debts, was not violated by the bank's taking a mortgage security upon real estate for the repayment of money loaned: *Alexander v. Brummett*, 42 S. W. 63.

Power of
Bank to
Hold Land

Where a subordinate lodge of a beneficial order receives dues from its members, which dues are, according to the constitution, laws and by-laws of the order, to be used only for certain purposes set forth therein, they become immediately impressed with a trust, and an appropriation of such dues to any other object is a breach of the trust: *Schubert Lodge, No. 118, Knights of Pythias of New Jersey v. Schubert Kranken Unterstutzungs Verein et al.* (Court of Chancery of Jersey) 38 Atl. 347.

Beneficial
Association,
Dues

The acceptor of a draft, in terms payable on the completion of a certain building, is not liable until notified of the completion of the building, and interest thereon only runs from the date of such notice: *Peck v. Granite State Provident Association*, 46 N. Y. Suppl. (Supreme Court) 1042. The facts in this case are meagrely reported, but it is assumed that the court did not mean to intimate that mere notice of the happening of the condition upon which the liability of the acceptor attached, obviates the necessity of presentment of the draft at the acceptor's place of business or residence. Under the common law interest is recoverable only by way of damages for a *wrong done*, and the acceptor has done none till after his liability attaches, *i. e.*, after presentment and demand: *Anonymous*, 6 Modern Rep. 138 (1705). See Keener, *Quasi-Contracts*, p. 154.

Bill of
Exchange,
Interest

When a draft is forwarded to a bank by a consignor of goods, accompanied by a bill of lading to the order of the consignor, the bank is made the agent of the consignor to receive and collect the draft, and to order the delivery of the goods, and the carrier is not liable for a conversion of the goods in delivering them to the proper owner and ultimate consignee, he having paid the draft to the bank, even though the bill of lading was not pro-

Carrier,
Bill of
Lading

duced by him; and this notwithstanding the bill of lading directed the goods to be delivered on production of the same properly indorsed: *Witt v. East Tennessee & W. N. C. R. Co. et al.* (Supreme Court of Tennessee), 41 S. W. 1064.

A contract to furnish materials to be used in the erection of a building, said materials to be delivered in such quantities and at such times as required and ordered, is not terminated at the date of the last delivery; but remains in force, in the absence of some act of the parties to the contrary, until the completion of the work in which such materials were used. *Bristol Brick Works v. King College* (Court of Chancery Appeals of Tennessee), 41 S. W. 1069.

The Supreme Court of California has decided that the moral obligation to pay a debt is sufficient consideration for a promise to pay, made after the debt has been discharged by proceedings in insolvency: *Lambert v. Schmaltz*, 50 Pac. 13.

The Supreme Court of Vermont has decided that a railroad company under contract to transfer mail at certain points on its road is not liable on an implied contract for services of one, who, also under contract to make certain transfers of mail, fulfils the company's contract without its solicitation, and also under the impression that he is performing his own contract; it further appearing that the railroad company also understood that it was such person's duty to make the transfers: *Johnson v. Boston & M. R. Co.*, 38 Atl. 267.

The Supreme Court of Florida has reiterated the principle that when one person has paid money in discharge of a liability which he has assumed at the request of another, or by his authority, the law implies a promise of indemnity on the part of the latter to the former: *Chamberlain v. Lesley*, 22 So. 736.

The Court of Chancery of New Jersey has recently held that a treasurer of a manufacturing corporation can be clothed with apparent authority to endorse for it, by a long-continued course of business with the knowledge and consent of the directors; and that parties trusting to this apparent authority, although not receiving the paper on the faith of the previous endorsements, will be protected. It was further held that, although the directors may not in fact have known of the endorsements,

they were chargeable with knowledge of what they easily might and, in the reasonable performance of their duty, ought to have discovered: *Blake v. Mfg. Co.*, 38 Atl. 241.

The Supreme Court of Tennessee has recently decided that when a corporation stops business owing to insolvency, and its directors adopt a resolution authorizing the president to file a bill in the Court of Chancery to have its assets administered, a trust *ipso facto* arises in favor of all its creditors and no one of them can reap the advantage of an execution to satisfy his judgment: *Memphis Barrel & Heading Co. v. Ward*, 42 S. W. 13. In this case the general creditors' bill on behalf of the corporation was not filed till almost an hour after the issuance of an instant execution, and the levy under it. In the light of recent decisions of the Supreme Court of the United States, the conclusion of the Tennessee court would appear to be incorrect. In *Graham v. R. R. Co.*, 102 U. S. 148 (1880), it was held that a corporation owns its property, just as absolutely as an individual does and can make any disposition of it that it pleases. In *Hollins v. Brierfield Coal Co.*, 150 U. S. 371 (1893), the same view was held, and it was further decided that the so-called "trust" does not arise in favor of creditors until the assets are in the possession of a court of equity for administration. See, also, *Hospes v. Car Co.*, 48 Minn. 174 (1892), where Judge Mitchell said: "The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further." Can it be doubted that a levy under an execution against an individual, after he has stopped business, but before he has executed any trust, deed or assignment for the benefit of creditors would be supported? See Clark on Corp., pp. 539-546.

Mass v. Moss [1897], Prob. 263, expressly decides a much disputed point by holding that concealment by a woman from her husband at the time of her marriage of the fact that she is then pregnant by another man is not a cause for divorce upon the ground of fraud. The interesting opinion of Jenne, Pres., declares, that "when there is consent no fraud inducing that consent is material." He criticises the leading American case to the contrary, *Reynolds v. Reynolds*, 3 Allen, (Mass.) 605 (1882), as introducing a novelty into the common law, adopts

Insolvency,
Assets as
Trust Fund

Divorce.
Wife's
Concealment
of Pregnancy
at Time of
Marriage

Bishop's criticisms of that decision, and shows that it is impracticable to carry it out without limitations. His argument is very strong, and leads to the conclusion that a contrary result can and should be reached only by careful legislation.

The Superior Court of Pennsylvania has held that where a deed conveyed to the grantee the privilege of backing water on the land of the grantor as much as the said grantee may think necessary by a dam on his said place, the extent of the grant must be measured by the user, and therefore, when, in pursuance of the above grant, a dam was built a certain height and so maintained for fifty years, the present owner of the land on which the dam was built has no right to increase the height of the same, and thereby to increase the amount of water backed up upon the property of the plaintiff who claims under the original grantor: *Hogg v. Bailey*, 5 Pa. Super. 426.

The Supreme Court of California in *People v. Ammerman*, 50 Pac. 15, has decided that a statement made by one charged with a crime under such circumstances that it would probably be inadmissible as a voluntary confession, is admissible in evidence against him if it does not contain a confession of guilt. The prisoner was charged with robbery and immediately after his arrest, in the presence of the officer, the district attorney subjected him to a rigid examination, in the course of which the prisoner admitted that he had money on the day after the robbery. The district attorney then said: "If you can explain where you got that money there may not be any necessity for going on with this case." The prisoner answered, "I found it." At the trial the prisoner stated that this statement was not true and that it had been induced by the hope that he would be released. This evidence was objected to, but admitted, since the court were of opinion that while the prisoner had admitted matters which, when connected with other facts, tended to prove his guilt, still he had made no direct confession and "the term is restricted to acknowledgments of guilt."

In *Gray v. Noonan* (S. C. Arizona), 50 Pac. 116, a sheriff had levied on plaintiff's goods as the goods of J. Plaintiff obtained judgment against the sheriff individually, but afterwards brought the present suit against the officer and his bondsmen on their official bond. The court held that the judgment in the former case, against

the sheriff personally, was not admissible in the action against his sureties and himself in his official capacity.

The Supreme Court of California has gone rather far in approving the use of notes under circumstances which appear as follows: In an examination of a prisoner in the district attorney's office before his examination by the magistrate, the prisoner's testimony was taken down by a stenographer and afterward transcribed by him. At the trial he was allowed to read from the transcribed notes, as a means of refreshing his memory: *People v. Ammerman*, 50 Pac. 15.

It was decided in *American Freehold Land & Mortgage Co. of London, Limited, v. Maxwell*, 22 So. (Fla.) 751, (1) that a married woman who claims property that has been levied on as her husband's, must be held to strict proof that it was purchased with her own money; (2) that a post-nuptial voluntary gift of real estate by husband to wife by deed, which was not recorded for ten years, the husband meanwhile retaining the possession thereof, was invalid as against his creditors. The transaction took place in Georgia prior to 1866, the date of the first married women's statute in that state; the husband had originally reduced his wife's money to possession by lending it on a mortgage, and had bought in this land at a sale under the mortgage; but it was held, nevertheless, that there was no implied trust in the land in favor of the wife, which would support the conveyance to her.

Curiously enough the old law of husband and wife is also recalled by *Hardin v. Young*, 41 S. W. (Tenn.) 1080. A wife was entitled by will to a one-seventh part of the proceeds of the sale of a piece of real estate after the death of a life tenant. She died before the life tenant. It was held that, though her husband had not during her lifetime reduced this chose in action to possession, he could properly do so after her death as her administrator for his own benefit as against her other heirs.

An admirable exposition of the law of separation agreements is found in the opinion of Pitney, V. C., in *Buttler v. Buttler*, 38 Atl. (N. J.) 300. A husband had defaulted in the payments specified in an elaborate agreement, the wife not being able under the New Jersey statute to sue in a common law action, filed a bill in equity against her husband to recover arrears. The court

Refreshing
Memory

Husband
and Wife,
Post-nuptial
Gift,
Fraud against
Creditors

Chose in
Action,
Reduction to
Possession
After Wife's
Death

Separation
Agreement,
Equitable
Defense

held that the suit, though brought in equity only for the reason above stated, was subject to the equitable defence that he was unable to make the payments because of inability to rent the real estate, which was his only property, and upon the expectation of renting which the amount of the annuity had been based.

Trefethen v. Lynam, 38 Atl. (Supreme Court of Maine) 335, is the most recent exposition of an ever recurring subject. A

Wife's Estate, wife owned real estate where she both housed her
Liability for family and ran a hotel; from time to time her
Husband's husband, who was a sailor, sent her remittances by
Debts checks, which were simply deposited in her hotel
account. It was held (1) that the husband's creditors could hold her estate for the money thus received; (2) that the burden was upon her to prove, if true, that an equal amount had been taken out of the firm account to pay family expenses, which it was her husband's duty to pay; and (3) that, especially in the absence of a specific agreement, the wife cannot be allowed for rent of her real estate occupied by her family.

The United States Circuit Court for the Middle District of Tennessee has recently granted injunctions to
Injunction, railroad companies restraining brokerage in rail-
Ticket way tickets: *Nashville, C. & St. L. R. v. McCon-*
Dealers *nell*, 82 Fed. 65. See 36 Am. L. REG. & REV. 57 (January, 1897), and 460 (July, 1897).

The Supreme Court of Louisiana has decided that the statement of a petit juror that he had formed an opinion with
Juror, regard to the guilt or innocence of the accused
Competency of from a conversation that he had held with his brother, who had been a juror on a former trial in which the accused had been found guilty on the same indictment, was not disqualifying, the information thus imparted being hearsay merely: *State v. Williams*, 22 So. 759.

The Supreme Court of Maine decided in *State v. Bowman*, 38 Atl. 331, that the presence of a stenographer in the grand
Grand Jury, jury room while witnesses are being examined in-
Presence of validates the indictment founded on such testi-
Stenographer mony, although the stenographer was there to take notes by order of the court and retired before the grand jury commenced their deliberations.

This is in accordance with the policy of the law that the proceedings had before the grand jury shall be in secret, and the line is drawn at the threshold.

The Supreme Court of Louisiana has held recently in *Frank v. Magee*, 22 So. 739 that where property is seized by the sheriff under a writ directing a sale, and pending his possession, but before sale, a trespasser enters and cuts standing trees, the severance does not make them fruits or revenues of the land, and if they are still upon the property at the time of sale, title to them would pass to the purchaser at such judicial sale as part of the realty. See, in accordance with this view, *Lidy v. Proctor*, 97 Pa. 486 (1881); *Rogers v. Gillinger*, 30 Pa. 185 (1876).

Land,
"Fruits and
Revenues."
Cutting of
Trees

A provision in a lease, that the lessee is not to dispose of any of the produce on the farm until the lessor has received the rent reserved in the lease, and certain stock, also part of the leased property, has been wintered through, gives the landlord no lien as against a creditor of the lessee: *Beers v. Field*, 38 Atl. (Supreme Court of Vermont) 270.

Landlord and
Tenant.
Lien on
Products

In an action for libel for publishing the statement that plaintiff, a married woman had eloped with one R., the chastity of the plaintiff was given great consideration and a large verdict for plaintiff resulted. On a motion for a new trial by defendant, based upon after-discovered evidence, it was held that, in spite of the general rule that "only the general reputation of plaintiff can be proven in reduction of damages in an action of libel," evidence of adulterous intercourse with R. might be introduced for the same purpose. "By suing for libel she may not open the door for an examination of all her past intercourse with any one, but she does invite an inspection of her relations with R.": *Smith v. Matthews*, 47 N. Y. Suppl. (Supreme Court) 96.

Libel,
Charge of
Unchastity.
Justification.
Evidence

The Supreme Court of Colorado has arrayed itself with those courts which hold that, in the absence of power reserved in the contract, or in the charter or by-laws of the association incorporated into a policy made payable to a certain beneficiary, the insured has no assignable interest: *Love v. Clune*, 50 Pac. 34.

Life
Insurance.
Assignment

In the same case it was decided that, where such an association is formed to benefit the heirs or families of the insured, a subsequent compulsory incorporation, under a statute including "assigns" as beneficiaries, will not enlarge the class of beneficiaries so as to

Embargement
of Class of
Beneficiaries

enable one insured before the change to cut out his heir in favor of a stranger: *Ibid.*

The rule that agents of insurance companies generally have power simply to receive and forward applications, has been recently applied by the Supreme Court of Oklahoma in determining the powers of the local lodges in a mutual life insurance order. Under the constitution and laws of the Home Forum Benefit Order it is provided that the local lodge may receive applications for benefit certificates, and that, if such applications are acceptable to the lodge and its medical examiner, they shall be forwarded to the Grand Secretary, who shall submit them to the Grand Medical Examiner, who has power to accept or reject the application. It is further provided that no beneficial certificate shall be binding upon the order until approved by the Grand Medical Examiner and signed by the President and Secretary of the order. The plaintiff's husband made application for a certificate. He was initiated into the local lodge, to which he paid initiation fees and dues; but, through the negligence of some one, the application was not forwarded to the Grand Medical Examiner until after his death. In reaching the result that there was no contract between the deceased and the corporation, the court seems to have been somewhat influenced by the view that the deceased, being a member, was supposed to know the rules of the order, and could, therefore, have been under no misapprehension as to the powers of the lodge as agent of the order: *Home, etc., Order v. Jones*, 50 Pac. 165.

In a suit by a mortgagee of part interest in a ship, in his own name, on a policy of insurance taken out by the ship's owners upon the ship, "as well in their own names as for and in the name or names of all and every other person or persons to whom the same doth, may or shall appertain in part or in all" against, *inter alia*, perils of the sea and barratry by master and mariners, the fact that the captain wilfully cast the ship away is no defence; and the fact that the plaintiff's mortgagor was the captain, although he had become such through the act of the plaintiff, does not alter the result. If the captain be regarded as the captain of the plaintiff, the latter can recover in respect to a loss by barratry of the master. If he be regarded as a stranger to the plaintiff, the latter can recover as for a loss by a peril of the sea: *Small v. Insurance Co.*, [1897] 2 Q. B. 311.

The District Court for the Eastern District of Pennsylvania, per Butler, J., decided, in *Phillips v. The Pilot*, 82 Fed. 111,

**Master and
Servant,
Knowledge
of Duties**

that a master of a tugboat is justified in assuming that a member of his crew is accustomed to all the ordinary duties required of men on such vessels. Therefore, where the master ordered one of the crew to jump ashore to attach a line, and the person received injuries by reason of his being unaccustomed to jumping, the master is not liable unless he had knowledge of the man's inability to do the act complained of.

In *McDonald, Adm'r, v. Norfolk & W. R. Co.*, 27 S. E. 182, the Supreme Court of Virginia decided that if a brakeman is

**Risks
Assumed by
Employee**

aware, on entering a railroad's employ, that he will be obliged to couple with mis-matched couplers, and continues in the service, and frequently performs that task, without complaining to the master, he assumes such risk. The peril was as obvious to him as to the company.

The Supreme Court of Tennessee, in an interesting case, recently held that where a party who had a right to a

**Mechanic's
Lien. Waiver.
Estoppel**

mechanic's lien takes, as collateral for a portion of his claim, mortgage bonds of the company against whom the lien is held, this act is presumed to be a waiver of the lien *pro tanto*. Such presumption, however, may be rebutted by testimony of the agreement and understanding of the parties to the arrangement. However, where the party who is entitled to the lien advises the company to execute a first mortgage, and bonds thereunder, a portion of which he retains as collateral for his debt, and the balance of which he encourages and aids the company in disposing of in the hope of getting his debt paid by the proceeds of the sale of such bonds, he is estopped as against *bona fide* purchasers of the first mortgage bonds from asserting his right of lien. There was nothing in the case to show that the purchasers took the bonds relying upon the representation of the party claiming the lien, but the court put their decision on the broad ground that a bond cannot be a first mortgage bond when there is any prior lien, and that, therefore, when the parties claiming the lien, permitted and encouraged the issuance of first mortgage bonds, they did an act inconsistent with the idea of the retention of the lien.

It is submitted that this decision goes too far and that the court was scarcely warranted in finding that the consent and approval of the party entitled to the lien, to the issuance of a

first mortgage, was an authority to issue a first lien. A first mortgage does not necessarily import a first lien: *Bristol, Goodson Electric, Etc., Co. v. Bristol, Etc., Co.*, 42 S. W. 19.

A curious contention as to the effect of a mortgage of corporate property, including that to be acquired in the future, was made in the case of *Santa Fe Electric Co. v. Hitchcock*, 50 Pac. (New Mexico) 332. It was urged with success in the lower court that, as the corporation which gave this mortgage became merged in another company, the property of the latter was an accretion of the old company so as to fall within the mortgage. This position was, however, not adopted by the Supreme Court.

**Mortgage.
After-
acquired
Property**

**Mortgage of
Assets of
Business,
Good-will**

The sale of a business may include the good will, but a mortgage of all the assets of a business does not cover the good-will. So held in *Santa Fe Electric Co. v. Hitchcock*, 50 Pac. (N. M.) 322.

The Supreme Court of Ohio, in a very interesting case, has recently held that the riparian owner, who owned to the middle of a navigable stream, and who, therefore, had the use of the water to the middle of such stream, had not an exclusive use, but that his rights were subordinate to the paramount easement of navigation by the public. This easement of navigation includes the right of mooring vessels in the stream, to repair the same, and to fit and put in machinery after launching, and the riparian owner, beyond whose shore line such vessels are moored, cannot, in the absence of special injury shown, recover damages. This right, however, to moor vessels does not extend to the use of the riparian owner's land not covered by water, and therefore, where a ship builder brings his cables across the river bank and fastens them on the land of a riparian proprietor, and insists upon a right to continue such use, an injunction will be granted to restrain such use, although no injury is proved, and the land is unimproved: *Pollock v. Cleveland Shipbuilding Company*, 47 N. E. 582.

**Navigable
Streams,
Rights of
Riparian
Owners**

The Court of Appeal, Queen's Bench Division, has held that a right of owners of fishing boats, yachts, and other boats, to erect permanent moorings on the soil of the foreshore of a tidal or navigable stream, for the purpose of attaching their vessels thereto, could be supported either as an ordinary incident of navigation over such water or on the ground that the im-

**Foreshore
Rights,
Immemorial
Easement**

memorial usage of such a right which was found as a fact by the jury, justified the presumption of a legal origin, either by grant from the Crown or by some subsequent owner of the foreshore: *Attorney General v. Wright*, [1897] 2 Q. B. 318.

According to the New York Supreme Court as found in their decision in *Jonas v. Long Island R. Co.*, 47 N. Y. Supl. Negligence. 149, a trial court is not bound to take judicial Stopping notice that a train can be brought from motion to Train With a "jerk," a state of inertia without impact or "jerk" of some degree. Therefore, where the plaintiff fell Judicial from the train as a result of a "jerk," in bringing Notice the train to a standstill, he is not entitled to recover, unless some evidence is offered to show the "jerk" was avoidable with the exercise of reasonable care, or that the "jerk" was of more than ordinary violence.

Where one firm procures an order for another and before Partnership, the goods are delivered to the purchasers, a member of the former firm dies, his estate is not responsible to the latter firm for the purchase money collected after his death: *Friend v. Young*, [1897] 2 Ch. 421. Agency, Death

The Circuit Court of the Northern District of New York has held that where a patentee sleeps on his rights for fourteen years he has no standing to sue for an infringement of his patent, as his right is lost by his own laches. The fact that the co-owners of the patent had no faith in its validity, and declined to prosecute suits for infringements, is no excuse for or justification of such laches, as the plaintiff could have proceeded alone and made his co-owners defendants, if they had declined to join as plaintiffs: *Richardson v. Osborn*, 88 Fed. 95. Patents, Infringement, Laches

The Supreme Court of Pennsylvania has considered a number of questions under the Act of May 12, 1887, which effected a marked change in procedure in this state. The statute provided, *inter alia*, that the declaration shall consist of a concise statement of the plaintiff's demand, which "shall be accompanied by copies of all notes, contracts, book entries . . . upon which plaintiff's claim is founded." In a recent appeal the record showed that an action of *assumpsit* was brought to recover from the defendant, as a guarantor, an amount alleged to be due by a principal debtor for goods sold Practice, Essential of Statement of Plaintiff's Demand

and delivered to him by the plaintiff. A copy of an undated contract or undertaking, signed and sealed by the defendant, was annexed to the plaintiff's statement. Accompanying this was what purported to be a copy of the paper, on which the defendant's undertaking was endorsed. This last copy, however, was a blank form of order for bicycles, addressed to the plaintiff, containing blank spaces, evidently intended to be used in specifying the kind, quantity, values, etc., of the goods to be ordered. The only written words which the order contained were the signature of the person giving the order and the words "quantity and specifications already sent in."

Chief Justice Sterrett, in his opinion, cited *Byrne v. Hayden*, 124 Pa. 170 (1889), and *Bank v. Ellis*, 161 Pa. 241 (1894). He quoted from the latter: "To entitle plaintiff to judgment for want of a sufficient affidavit of defence, the statement of his demand must be self-sustaining—that is to say, it must set forth, in clear and concise terms, a good cause of action—by which is meant such averments of fact as, if not controverted, would entitle him to a verdict for the amount of his claim All the essential ingredients of a complete cause of action must affirmatively appear in the statement and exhibits which are made part thereof." The Chief Justice further said, referring to the provision of the statute above recited: "This is not merely directory—it is absolutely imperative; and if the copy of the written or printed contract on which the action is founded, or any part thereof, does not accompany the statement, and its absence is not satisfactorily accounted for, the omission cannot be supplied by averments of the contents or substance of the missing paper. Without the defendant's consent such averments cannot be accepted as the legal equivalent of the 'copy' or 'copies' required by the Act, except in the case of papers shown to have been lost or destroyed." It was held that the statement was incomplete and insufficient, and defendant not bound to answer it: *Acme Mfg. Co. v. Reed*, 181 Pa. 382 (1897).

In connection with the foregoing case we may notice one in the State of New York. The Supreme Court, Appellate Division, Third Department, in a *per curiam* opinion on October 1, 1897, decided that the following statement was insufficient to meet the requirements of Section 1274 of the Code of Civil Procedure, under doctrines established in *Wood v. Mitchell*, 117 N. Y. 429:

"This confession of judgment is for a debt and liability justly due to the said plaintiff, arising upon the following facts, viz.,

being for a balance due for goods, wares, and merchandise sold and delivered to me, Fred. C. Greene, by the plaintiff, William W. Blackmer, and remaining unpaid and unreceived." The above section of the Code provides that the statement "must state concisely the facts out of which the debt arose, and must show that the sum confessed therefor is justly due, etc.": *Blackmer v. Greene*, 47 N. Y. Suppl. 113.

A provision in a note promising to pay, in addition to the principal sum, "the further sum of ten per cent. upon amount found due" in case suit was brought on the note, does not render the note non-negotiable: *Salisbury v. Stewart*, 49 Pac. (Utah) 777.

Probably in accord with the weight of authority: See *Sperry v. Horr*, 32 Ia. 184 (1871), *accord*; and *Woods v. North*, 84 Pa. 407 (1877), *contra*.

A note, payable to the maker's order, had on the back of it the following: "Pay to the order of _____, to whom we guarantee payment, etc." Names of the payee were signed below the guarantee. *Held*, an indorsement: *Byers v. Bellan-Price Ins.*, 50 Pac. (Col.) 368. The maker and the payee being the same, the guarantee was meaningless and could be stricken out. The general rule is that a guarantee by a payee or any subsequent party to a bill or note will not operate as an endorsement thereof. See *Belcher v. Smith*, 7 Cushing, 224 (1851), and note thereto in Ames' Cases on Bills and Notes, Vol. I., p. 225.

Where a creditor accepts his debtor's note in payment, on the strength of an indorsement made for that purpose, his relinquishment of his right to proceed against the maker, upon the pre-existing debt, furnishes a consideration as against the indorser, though the note is payable on demand: *Kelly v. Theiss*, 47 N. Y. Suppl. 145 (Supreme Court). The debtor's note being taken in payment and not as security for the debt, the creditor becomes a purchaser for value: *Brown v. Leavitt*, 31 N. Y. 113 (1865). The rule is otherwise in New York, if the note is taken as security for the debt: *Bay v. Coddington*, 5 Johnson's Ch. Rep. 54 (1821).

An action for money had and received cannot be maintained

by a corporation to recover a sum received by a former director as a bribe for resigning his office and procuring control of the corporation to be turned over to the purchaser for corrupt purposes.

Quasi
Contracts,
Money Had
and Received

The only remedy of a corporation in such a case is an action to recover damages for the fraud practised upon it by the director: *McClure v. Law*, 47 N. Y. Suppl. (Supreme Court) 84.

Indebitatus assumpsit can only be elected as a remedy for those torts in which the commission of which the tort-feasor has enriched himself at the expense of the plaintiff by taking or using the plaintiff's property: See *Phillips v. Homfray*, 24 Ch. Div. 439 (1883).

"Money had and received," will lie against mortgagee who has received more money in payment of mortgage than the mortgage actually called for. The mortgagor may have this action, even though he has also an action against his agent, who fraudulently so paid the over amount: *Tewatsch v. Cooney*, 47 N. Y. Suppl. (Supreme Court) 541.

This is an ordinary example of the quasi-contractual right to recover money paid under mistake. See Keener on Quasi-Contracts, Chap. II.

In *Miller v. Roberts*, 47 N. E. 585, the plaintiff conveyed his farm to a third person, for the benefit of defendant, in consideration of defendant's oral promise to convey to him another farm. The defendant refusing to convey, the plaintiff was permitted to recover to the extent of the benefit conferred upon the defendant, even though the defendant's promise was non-enforcible by reason of the Statute of Frauds, and, furthermore, that even though the plaintiff had received, prior to the breach, from the defendant certain articles of personal property as part of the consideration for his conveyance, for though he must account for their value, yet he was not bound to return the same before bringing suit, as the plaintiff had not rescinded the contract.

Restitution,
Default in
Contract,
Statute of
Frauds

The duty of a defendant under a contract non-enforcible by reason of the Statute of Frauds is to make restitution of the benefits received by the plaintiff's performance: See *Dowling v. McKenney*, 124 Mass. 478 (1878), for the principles applicable to this doctrine.

Where a county, liable for expenses, has paid expenses,

for a part of which by special act a separate court house district was liable, the payment is not voluntary, and can be recovered from the court house district: *Money Paid, Recovery Campbell County v. Commissioners of Court House District*, 42 S.W. (Ky.) 111. This is an example of the rule that where a plaintiff pays the claim of a third person existing against both the plaintiff and the defendant, but which should be paid by the defendant, the plaintiff may recover the same from the defendant as money paid to the defendant's use: *Brown v. Hodgson*, 4 Taunton, 189 (1811).

Plaintiff's son was killed while acting as brakeman on defendant's train, by being struck by a derrick which had been erected over the track by defendant, and of whose existence decedent was aware. Defendant contended that "it is not negligence in a railroad company to construct or permit to be constructed overhead hanging bridges, etc., over its tracks so low as not to permit a brakeman to stand upright on the top of a box car. Lower court took this view and held complaint insufficient; but the Supreme Court in sending the case back to the jury, declared, "it is rare that abstract principles of law are so fixed and absolute as not to be modified or controlled by the special facts of the case to which they are sought to be applied:" *Gusman & Caffery Cent. Refinery v. Railroad Co.*, 22 So. (La.) 742.

Though an altogether unprofitable decision to the general practitioner, *First National Bank of Canton v. Washburn*, 47 N. Y. Suppl. 117, is of value as a reminder that a receiver who unnecessarily opposes an honest claim may make himself personally liable for the resulting costs.

The Supreme Court of Oklahoma has decided that when, under the rules and discipline of a religious organization, a "call" to the pastorate of a church owing allegiance to such organization, is not effective until formally sanctioned by the presbytery thereof, such call not so sanctioned creates no civil contract: *First Presbyterian Church of Perry v. Myers*, 50 Pac. 70.

Where goods are shipped C. O. D., and the consignee re-

failed to accept them, but after a lapse of ten months, during which time no agreement was reached, the consignee agrees to accept the consignee's note for the goods and to "arrange to turn the goods over," the consignee is not liable on the note, or for the value of the goods, he having failed to receive them through the fault of the carrier in whose custody the goods were: *Cole v. Rankin* (Court of Chancery Appeals of Tennessee), 42 S. W. 72.

The stranding of the "St. Paul" on the New Jersey coast on the 24th of January, 1896, excited a great deal of interest throughout the country, and the successful manner in which the passengers, mails and cargo were removed, and finally the vessel itself extricated from its predicament but a few days before some violent storms, is probably well remembered. Considering that the vessel was valued at over two million dollars, and the cargo, consisting largely of specie, at nearly that amount, and that pretty much the whole wrecking force of the eastern coast was engaged in the work, the decree of \$160,000 for the salvage services seems quite moderate. This case applies the well-recognized principle that the community of interest between the vessel and her cargo ceases upon the unloading of the latter, and, as that was accomplished at the end of the first four of the eleven days required for the entire task, the cargo was charged with a little less than two-elevenths of the whole award: *The St. Paul*, 82 Fed. 104. (Dist. Ct., S. D. of N. Y.)

The Supreme Judicial Court of Maine has lately ruled on an important and, indeed, fundamental question of law which seems never before to have been adjudicated, viz., the time in which a search warrant must be executed when no time is fixed by the terms of the warrant itself. The court in the case in which the question arose decided that the warrant (which authorized a search for intoxicating liquors), in the absence of reasons for the delay, became *functus officio* after a reasonable time; that what was a reasonable time was a question for the court; and that three days having elapsed in this case the warrant could not be lawfully executed: *State v. Guthrie*, 38 Atl. 368.

Where there is a running account between two parties, cer-

tain items of which are barred by the Statute of Limitations, a payment of a portion of the amount due, unappropriated by the debtor to the items barred, will not toll the statute as to those items. But it may, with the other circumstances of the case, be evidence of the intention of the debtor in making the payment. Thus where, apart from the statute-barred items, the amount due at the time of payment is less than the amount of that payment; where the payment is stated to be "on account," and made expressly with reference to a statement of account including the statute-barred items, the court will treat it as an acknowledgment of an account on which a balance greater than the amount paid will be due; and will imply a promise to pay that balance: *Friend v. Young*, [1897], 2 Ch. 421.

Statute of
Limitations.
Acknowledgment
of Debt

The Supreme Court of Errors of Connecticut has decided that, under a statute forbidding the construction and extension of street railways, except on a finding by the court that public convenience and necessity require such construction or extension, the applicants' financial ability to build such railway is a circumstance to be considered. *In re Shelton Street Railway Co.*, 38 Atl. 362.

Street
Railways.
Application
for Leave
to Construct

The rule that equality is equity, usually determines the liability of sureties *inter se*; but where, as in *Pile v. McCoy*, 41 S. W. (Tenn.) 1052, the guardian's default is occasioned by his paying his personal debt to one of the sureties out of his ward's estate, the innocent surety, if compelled to make good the guardian's default, can recover the whole amount from his co-surety, who caused and received the benefit of that default.

Suretyship,
Contributions

It has been decided by the Supreme Court of Nevada that the net earnings of a railroad, forming the basis of valuation for taxation, are determined by deducting the necessary expenses, under reasonably economical and prudent management, from the gross earnings under similar management; and that a reduction of \$13,839 in the pay roll of a railroad during 1896, coupled with proof that no more officers and employes were necessarily required in 1895 than in 1896, will justify a jury in finding that the actual expenses during 1895 could have been reasonably reduced \$13,839: *State v. Virginia & T. R. Co.*, 49 Pac. 945.

Taxation,
Railroad.
Reduction of
Expenses

A will provided that the testator's daughter should be entitled to receive a certain share of the income of a residuary trust estate on condition that she should remain on the continent of Europe during the lifetime of her husband (who resided in New York), unless absolutely divorced from him. The New York Supreme Court in interpreting this provision declined to recognize the validity of the superadded condition and affirmed the well settled rule that a condition attached to a legacy which tends to separate husband and wife, and to compel them to live apart, is void, as opposed to public policy: *Cruger v. Phelps*, 47 N. Y. Suppl. 61.

The Court of Chancery in England, *In re Groom*, [1897], 2 Ch. 407, has recently been called upon to interpret a will containing a bequest by a testator of £4000 to his trustees "in trust for the two children of W. in equal shares as tenants in common, to be paid to them on respectively attaining the age of twenty-one years, or marrying under that age." At the time the bequest was made W. had four children living. It was held, following *Lee v. Pais*, 4 Hare, 249 (1849), that the four children were entitled to take equally, the word "two" being rejected upon the presumption of mistake.

It is well to note, however, that the rule may be overthrown when there are circumstances from which inferences can be drawn as to the particular children intended to be benefited, as was the case in *Newman v. Percy*, 4 Ch. Div. 481 (1876); and also that the rule is not extended to a bequest to an individual or the children of an individual when there is more than one in existence answering to the description of the individual, such bequest being void for uncertainty, as was held in *In re Stevenson*, [1897], 1 Ch. 75.

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TELEGRAPH COMPANIES; LIMITATION OF LIABILITY BY CONTRACT. In a recent case decided by the Supreme Court of Kentucky, *Western Union Tel. Co. v. Eubank*, 36 L. R. A. 711 (Feb., 1897), it was held that a contract limitation of sixty days, within which a claim must be presented in writing, for damages on account of the default of a telegraph company in respect to the transmission of a message, is unreasonable and contrary to public policy; and that if not an attempt to vary the statute of limitations, it would, if enforced, have that effect.

The court cited no authorities in support of its decision, but many cases are found in the books in which it has been declared that this time agreement has the effect of a statute of limitation, and in some jurisdictions similar regulations are construed to constitute a limitation of liability. In *Western Union Tel. Co. v. Longwill*, 21 Pac. (N. M.) 339 (1889), the court was of the opinion that it would introduce into the local jurisprudence of every state a species of private statute of limitation or non-claim, and would avoid the policy of the state in the matter of the time in which

actions, both in tort and contract, should be brought. In support of this view, see *Western Union Tel. Co. v. Cobb*, 47 Ark. 344 (1886); *Western Union Tel. Co. v. McKibben*, 114 Ind. 511 (1887); *Western Union Tel. Co. v. Way*, 83 Ala. 542 (1887); also, *Southern Express Co. v. Caperton*, 44 Ala. 101 (1870), in which a similar limitation was held to be unreasonable and void, as tending to fraud. In *Johnson v. Western Union Tel. Co.*, 33 Fed. (C. C. S. D. Ga.), 362 (1887), the stipulation was considered unreasonable, since its effect would be to preclude from the right of action the person to whom a prepaid telegram is directed and to whom it has never been delivered, no matter how gross the negligence of the company may be. The same conclusion is reached in *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558 (1873); *Western Union Tel. Co. v. Griswold*, 37 Ohio, 301 (1881); *Western Union Tel. Co. v. Coolidge*, 86 Ga. 104 (1890); and *Brown v. Postal Tel. Co.*, 17 L. R. A. (N. C.) 648 (1892).

In a dissenting opinion, in *Kirby v. Western Union Tel. Co.*, 30 L. R. A. (4 South Dakota, 105, 436), 612 (1893), Kellam, J., says that, admitting the reasonableness of the stipulation, it is, nevertheless, repugnant to public policy, since it allows the telegraph company to require a party to assent to such an agreement before it will undertake to perform its legal duty. The majority, however, held that the effect of the stipulation is not to create a new statute of limitation, since the action, after notice of claim served, may be brought any time within the period prescribed by law; and that the regulation is reasonable (since the difficulty of ascertaining facts increases with the lapse of time), and is, therefore, not an attempt to limit the company's common law or statutory liability. In *Western Union Tel. Co. v. Dougherty*, 54 Ark. 221 (1891), it was decided that such a stipulation was one against the delay or neglect of plaintiff in presenting his claim, and not unreasonable.

Sixty days have been held to be a reasonable time in *Western Union Tel. Co. v. Jones*, 95 Ind. 235 (1884); *Ellis v. American Tel. Co.*, 95 Mass. 226 (1866); *Breese v. U. S. Tel. Co.*, 48 N. Y. 132 (1873); *Southern Express Co. v. Caldwell*, 21 Howard, 264 (1874); *Wolf v. Western Union Tel. Co.*, 62 Pa. 83 (1869); *Young v. Western Union Tel. Co.*, 65 N. Y. 165 (1875); *Western Union Tel. Co. v. Raines*, 63 Tex. 27 (1885); and *Squire v. Western Union Tel. Co.*, 98 Mass. 232 (1867). The Supreme Court of Mississippi, in *Southern Express Co. v. Hunnicutt*, 54 Miss. 566 (1877), decided that a printed stipulation at the bottom of an express receipt for a package, that the company shall not be liable for any loss unless a written claim shall be made at the shipping office within thirty days, is valid. The same period was held to be a reasonable time in *Western Union Tel. Co. v. Durfield*, 12 Colo. 335 (1888); *Western Union Tel. Co. v. Callerson*, 79 Tex. 65 (1890); *Cole v. Western Union Tel. Co.*, 33 Minn. 228 (1885); *Massengale v. Western Union Tel. Co.*, 17 Mo. 257 (1885); and *Beasley v. Western Union Tel. Co.*, 39 Fed. (C. C. W. D. Tex.), 181 (1889).

AUCTION SALE—VALIDITY—EMPLOYMENT OF "PUFFERS." In *Broman v. McClenahan*, 46 N. Y. Suppl. 945 (Supreme Ct., Aug. 4, 1897) (See *Progress of Law*, 36 AM. L. REV. & REV. N. S. 175 (Nov. 1897)), it was decided that where the owner of a property puts it up at auction, and secretly employs "puffers" to bid in his behalf, a bidder at such sale to whom the property is struck off, can disaffirm his contract.

In England there were formerly two distinct lines of cases on this question. The common law courts followed the rule first laid down by Lord Mansfield in *Baxwell v. Christie*, Cowp. 395 (1776), where it was held that the employment of a "puffer" at an auction sale, rendered the sale void. The Court of Chancery, however, held that the hiring of a "puffer" was not a fraud and would not vitiate the sale: *Conolly v. Parsons*, 3 Ves. Jr. 625, note 1 (1797). Later the same court modified this rule by drawing a distinction between "puffing" in order to raise the price and "puffing" to protect the interests of the vendor. The former was held illegitimate while the latter was allowable: *Smith v. Clark*, 12 Ves. Jr. 477 (1806); *Flint v. Woodin*, 9 Hare, 618 (1852).

This conflict of opinion in England was ended in 1867 by an Act of Parliament, which declared "Whenever a sale by auction of land would be invalid at law by reason of the employment of a 'puffer,' the same shall be deemed invalid in equity as well as at law." So the law of England is now in accordance with the decision handed down in *Baxwell v. Christie* (*supra*). The Supreme Court of the United States follows the same rule: *Veasie v. Williams*, 8 How. 134 (1850).

In Pennsylvania the courts at first adopted the English Chancery rule, as modified in the later cases, and held that the employment of a "puffer" did not invalidate a sale if it was done solely to prevent a sacrifice of the property: *Steele v. Ellmaker*, 11 S. & R. 36 (1824). This case was subsequently overruled and it is now held that the employment of even one "puffer" is sufficient to avoid the sale: *Pennock's Appeal*, 14 Pa. 446 (1850); *Stames v. Shore*, 16 Pa. 200 (1851); *Yerkes v. Wilson*, 81 Pa. 9 (1870).

SEARCH WARRANT; MINISTERIAL OFFICERS. *State v. Guthrie*, 38 Atl. 368 (Me., June 16, 1897). The facts of this case are stated in the "Progress of the Law" of this issue; the precise point decided appears never to have been ruled upon previously and deserves further consideration. The point is, that a warrant to search for intoxicating liquors is void at the end of a reasonable time after it is given to the proper officer for execution (in this case, three days), and the officer's authority thereunder expires; what is such reasonable time being a question of law which depends upon the circumstances of each case. The court declares that it is a general principle of our law that "Ministerial officers assuming to execute a statute or process upon the property or person of a citizen shall execute it promptly, fully and precisely;" and that,

under the Maine Statute, promptly means immediately or within such time as the court deems reasonable under the circumstances.

It would seem that this conclusion should be reached independently of the interpretation of any statute, from the ministerial character of the officer executing a search-warrant. A ministerial officer has no discretion as to performance of the acts pertaining to his office: *Pennington v. Straight*, 54 Ind. 376 (1876); *Sullivan v. Shanklin*, 63 Cal. 251 (1883); 19 Amer. & Eng. Cyclo. Law 392. Having no such discretion he should perform the acts required of him by law, within a reasonable time as construed by a court; otherwise he might wait indefinitely, and thus practically *chose* not to act. This principle has been applied to ministerial acts, other than the execution of a search-warrant, as follows: Sheriffs and constables must execute process within a reasonable time, under the circumstances: *Lindsay's Exrs. v. Armfield*, 3 Hawk's (N. C.), 548 (1825); *Kittredge v. Bellows*, 7 N. H. 399 (1835); *Hallett v. Lee*, 3 Ala. 28 (1841); *Tucker v. Bradley*, 15 Conn. 46 (1842); *Whitney v. Butterfield*, 13 Cal. 335 (1859); *Hearn v. Parker*, 7 Jones (N. C.), 150 (1859); *Chapman v. Thornburgh*, 17 Cal. 87 (1860); *Phillips v. Ronald*, 3 Bush (Ky.), 244ⁿ (1867); *Freudenstein v. McNier*, 81 Ill. 208 (1876); *French v. Kemp*, 64 Ga. 749 (1880); *Elmore v. Hill*, 51 Wis. 365 (1881); *State v. Leland*, 82 Mo. 260 (1884); *Cowan v. Sloan*, 95 Tenn. 424 (1895); *Guterman v. Sharry*, 48 N. W. 780 (Minn.) (1891). A tax-collector must pay to the proper officer the money he collects, within a reasonable time; *Justices v. Fenimore*, *Coxe* (N. J.), 242 (1794); *Chenango v. Birdsell*, 4 Wend. (N. Y.) 453 (1830); *Sheridan v. Van Winkle*, 43 N. J. L. 125 (1881). An officer charged with the repair of highways must make repairs within a reasonable time: *Adsit v. Brady*, 4 Hill, (N. Y.) 630 (1843); *Hoover v. Barkhoof*, 44 N. Y. 113 (1870). A sheriff must set out a debtor's exemption: *Handy v. Sheriff*, 50 Mich. 355 (1883); and remove property levied upon: *Davis v. Stone*, 120 Mass. 228 (1876); *Williams v. Powell*, 101 Mass. 467 (1869); within a reasonable time. And it seems logical, as well as necessary to the protection of the citizen, to apply the same principle to the "sharp and heavy police weapon," the search-warrant.

NEGOTIABLE INSTRUMENTS; LIABILITY OF MAKER; FRAUD. The City Court of New York, in General Term, has decided that a party who is induced to sign a promissory note by fraud or deception practiced upon him by the payee, and signs it, thinking that it is a different kind of contract, is not liable thereon to an innocent indorsee for value before maturity, unless the maker was guilty of laches or carelessness in omitting to ascertain the true nature of the instrument: *Hutchoff v. Mays*, 46 N. Y. Suppl. 905 (July 2, 1897). See 36 Am. L. REG. & REV. (N. S.) 724. This is not a new rule in New York: *Bank v. Veneman*, 43 Hun. 241 (1887). But one who has all the means of information at hand,

and chooses to rely upon the representations of another as to the nature of the paper which the former is signing, is estopped by his negligence from setting up the fraud in obtaining the note as against a *bona fide* purchaser for value before maturity: *Chapman v. Rose*, 56 N. Y. 137 (1874).

There is rather a hopeless conflict of authorities regarding the liability of persons whose names appear on negotiable instruments, through fraud, when the paper is in the hands of *bona fide* holders. An attempt at reconciliation would be useless. There are many cases where persons have been induced by fraudulent representations to sign negotiable paper, intending and believing that they were signing some other form of contract. There is authority for the proposition, that in the absence of negligence on the part of such persons, they are not liable, even though the paper come into the hands of a *bona fide* purchaser for value before maturity: *Taylor v. Atchinson*, 54 Ill. 196 (1870); *Puffer v. Smith*, 57 Ill. 527 (1871); *Anderson v. Waller*, 34 Mich. 113 (1876); *Bank v. Lierman*, 5 Neb. 247 (1876); *Griffiths v. Kellogg*, 39 Wis. 290 (1876); *Green v. Wilkie*, 66 N. W. 1046 (Iowa, 1896). And this would seem to be because there was no contract originally, inasmuch as the person so signing had no intention of signing such a paper: *Walker v. Ebert*, 29 Wis. 194 (1871). But it is necessary for the maker to show freedom from negligence: *Bank v. Steffes*, 54 Iowa, 214 (1880). However, if the fraud be made possible by the negligence or carelessness of the maker, he is liable to a *bona fide* holder: *Garrard v. Haldan*, 67 Pa. 82 (1870); *Douglass v. Matting*, 29 Iowa, 498 (1870). In any case, however, the *bona fide* holder of a negotiable instrument, fraudulent in its inception, can recover from the maker only so much as the former paid for it: *Beckhous v. Bank*, 22 W. N. C. (Pa.), 53 (1888); *Oppenheimer v. F. & M. Bank*, 36 S. W. (Tenn.), 705 (1896).

On the other hand, it has been decided that it is no defence to an action by a *bona fide* holder against the maker of a note that the latter was induced to sign it by fraud: *Broadbent v. Huddleson*, 2 W. N. C. (Pa.), 293 (1876); *Bank v. McCann*, 11 Id. 480 (1882); *Highsmith v. Martin*, 24 S. E. (Ga.), 865 (1896). Nor can such a note be invalidated in the hands of a *bona fide* holder unless actual fraud can be shown on his part: *Matthews v. Peythress*, 4 Ga. 287 (1848); *Worcester Bank v. Dorchester Bank*, 10 Cush. (Mass.) 488 (1853); *Crosby v. Grant*, 36 N. H. 273 (1858); *Bank v. Hoge*, 7 Bosw. (N. Y. Superior Ct.), 543 (1861); *Magee v. Badger*, 34 N. Y. 247 (1866); *Hamilton v. Vought*, 34 N. J. L. 187 (1870); *Bank v. Hewitt*, 34 Atl. (N. J.), 988 (1896). But the holder of such a note has the burden of proving his good faith: *Hardware Co. v. Bank*, 109 Pa. 240 (1885); *Hale v. Shamon*, 57 Hun, (N. Y.) 466 (1890); *Jones v. Burden*, 56 Mo. App. 199 (1893); *Campbell v. Huff*, 31 S. W. (Mo.), 603 (1895); *Hodson v. Glass Co.*, 40 N. E. (Ill.), 971 (1895); *Fawcett v. Powell*,

43 Neb. 437 (1895); *Thamling v. Duffy*, 37 Pac. (Mont.), 363 (1895).

ALIENS; TAXATION; EQUAL PROTECTION OF LAWS. The United States Circuit Court for the Western District of Pennsylvania, per Achenson, J., recently declared the Pennsylvania Alien Tax Law unconstitutional: *Fraser v. McCoway & Sorley Co.*, 54 Leg. Int. 364, 6 Dist. R. 555 (Aug. 26, 1897).

The act in question imposed upon employers of alien laborers a tax "at the rate of three cents per day for each day each of such foreign-born, unnaturalized male persons may be employed," and authorized the employer to deduct the amount of the tax from the wages of the employee. This latter provision made the tax really upon the employee and not on the employer: *Bell's Gap R. v. Pa.*, 134 U. S. 232, 239 (1889), in which it was said that a tax laid on a railroad corporation, to be paid out of the interest of its bonds, is a tax on the bondholder and not on the corporation. The case thus falls squarely under the Fourteenth Amendment, the guarantees of which "extend to all persons within the territorial jurisdiction of the United States, without regard to differences of race, color, or nationality:" *Matthews, J., in Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886).

Some of the western states have adopted ingenious methods of discriminating against the Chinese, the particular class of aliens especially hated in the mining districts. They have cloaked their taxation in the guise of a license system for certain classes of business, putting a "license" of \$25 on hand laundrymen employing one or more other persons, while requiring steam laundries to pay a fee of \$15 only: *State ex rel. Fai v. French*, 17 Mont. 54 (1895). The law was held valid because in terms it applied to all male laundrymen of every condition and nationality, the court remarking: "The fact that Chinamen are engaged in the hand-laundry business is purely fortuitous." See this case in 30 L. R. A. 415, where it is fully annotated. But where the aliens obnoxious to the legislature have not engaged in one kind of business exclusively, it would seem that all opportunities for discriminating against them in taxation are barred by the Fourteenth Amendment.

Gulf, C. & S. F. R. v. Ellis, 165 U. S. 150, 165 (1897) declares that classification for purposes of taxation must have a reasonable basis. In that case the State of Texas had by law allowed parties having a valid claim against a railroad corporation to recover the amount of the claim *plus attorney's fees*. This was held an unreasonable discrimination against the railroads. In *R. R. Tax Cases*, 13 Fed. 722 (1882) a law taxing property in general at a reduction from face value, but assessing taxes on railroad property at its actual worth, was decided to be unconstitutional.

BOOK REVIEWS.

DOMESDAY BOOK AND BEYOND; THREE ESSAYS IN THE EARLY HISTORY OF ENGLAND. By FREDERIC WILLIAM MAITLAND, LL.D. Cambridge, University Press. Boston: Little, Brown and Company. 1897.

The importance of this book could have been almost as well predicted before as it can now be acknowledged after its appearance. Prof. Maitland's work in his *Introductions* to the Selden Society's Publications, in his *Pleas of the County of Gloucester*, in his edition of Bracton's *Note-book*, and above all in his great work, in collaboration with Professor Pollock, on the History of English Law before Edward I., has accustomed the whole scholarly world to the expectation that everything which he writes will be of the utmost significance and interest. He has brought to bear upon the history of the law and of those institutions which lie in the borderland between the law and more strictly political, economic, and social institutions, a combination of learning, of ingenious inference and of vivacious presentation which bids fair to revolutionize not only the traditional views upon many points but the usual methods of treatment of the whole field. The task of the reviewer may therefore be reduced to the effort to point out the relations of Mr. Maitland's conclusions, in some of their main points, to the body of previous knowledge and opinion on the same subjects. It may be said in a preliminary word that his whole argument looks toward the greater early freedom of the body of the population, the essentially Teutonic and tribal basis of early institutions, and to the enormous influence of political powers and occurrences on the fabric of society. Then we shall select some two or three salient points as being sufficiently typical of the whole work and as reaching results to a large extent new.

First, we shall examine his theory of the Domesday manor. Mr. Maitland has in this case, to a certain extent, created the difficulty he proceeds to solve. In the somewhat superficial study that Domesday book has so far obtained, it is probable that the *Maneria*, which are mentioned everywhere, have been generally conceived of as being the same as those of the thirteenth century, and pictured as judicial or agricultural units, according as the student was a lawyer or an economist. But it is here pointed out that the manor was by no means synonymous with the vill, and the later definitions will not by any means always apply. Some manors are so extensive as to include twenty or thirty villages, with a population of perhaps five hundred families; others are merely the single farms of peasant proprietors. These cannot have courts of their own, often they have no freehold tenants, sometimes no customary tenants, fre-

quently no demesne land ; so one after another the later tests of a manor fail us. Yet the word manor, in Domesday book, is undoubtedly used as a technical term,—it had some generally recognized and intended meaning. What was meant by a manor in 1086? Professor Maitland finds his answer, the definition of manor, in the sphere of finance. He considers the Domesday manor as simply the house or tenement against which the geld or land tax was charged, the unit of royal taxation, or rather of the collection of the tax. It may be a certain principal centre of a whole group of villas or the principal messuage of a single vill, in both of which cases the lord would be responsible for the payment of the geld of all the tenants. In the latter of the cases the manor would probably be coincident with the village. On the other hand, in the case of small tenements held "as manors," they can make up only a small part of a village, so that in one village several *Mannors* are represented. And correspondingly the lands making up one manor may be scattered in several villas. The government simply held certain persons, lords or holders of manors, responsible for the geld. Such persons paid for all those fiscally dependent upon them, whether these persons were concentrated in one or in several villages, or scattered among other persons in various villages. The connection between these manors of the eleventh century and those of the thirteenth, which we know so well and which were so generally identical with the villas or townships, has not been worked out ; but the lines of its development are perhaps already traceable in the changes between the first and last dates given in the survey itself, the time of King Edward and 1086.

Lastly, we wish to give Mr. Maitland's views on the rise of the boroughs. In this matter he is most original and will probably meet with the greatest amount of antagonism from those who have held a different theory. His belief as to the origin of the boroughs is that it was distinctly legal, military, intentional ; that the boroughs were created by the King, from above, so to speak ; that they did not grow up from below by the mere gradually increasing concourse of traders, based on and responding to economic necessities and processes. He supposes that the boroughs were originally fortified county strongholds, one or perhaps more in each shire ; that they were occupied by men placed there by the various thanes or landholders of the shire, in fulfilment of their duty of providing a certain number of military servants, always armed and equipped. Subsequently the rigid King's peace guarding the borough, the meeting of its court three times a year, as provided for in the laws, its possession of an established market, all these things combined to make the boroughs, by the time the Domesday survey was taken, more populous, more varied in their interests, more commercial and more free ; showing the traces of their military and royal origin only in indications that are already obscure and ambiguous. This analysis does not seem to us conclusive. Under this theory it will be necessary to explain how it is that in later centuries such a con-

siderable number of towns are on the demesne of other lords than the king ; that the "customs," where these chance to have been recorded, have such a slight suggestion of anything military or royal, and that when the towns come to receive charters, it is the customs, franchises, gild merchant, and exemptions from jurisdiction that are legalized, no mention being made of royal rights or military interests. And yet his line of demonstration is such that an entirely new form of defense will have to be provided by those who hold a different view.

After all, it is not perhaps wise to try to estimate Professor Maitland's book by its definite teaching on individual questions. Different opinions will continue to be held on single points. What is of vastly more importance is his method. No subsequent study of these matters can fail to partake in some degree of the broad, comparative examination, the acuteness, the moderation, even of the brilliancy of Prof. Maitland's method of work. He has placed the study of Domesday and of the English institutions, for which it stands, upon an entirely different and a far higher plane.

E. P. C.

A TREATISE ON THE LAW AND PRACTICE OF FORECLOSING MORTGAGES ON REAL PROPERTY, AND OF REMEDIES COLLATERAL THERETO. With Forms. By CHARLES HASTINGS WILTIE, of the Rochester Bar. With a Supplement, bringing the work down to March, 1897, and Additional Chapters on Mortgage Redemptions, by JAMES M. KERR, of the New York Bar. In Two Volumes. Vol. II. Rochester, N. Y.: Williamson Law Book Company. 1897.

The work by Mr. Wiltie appeared in 1889, and now Mr. Kerr has undertaken to "bring it down to March, 1897," and has added ten chapters on "Mortgage Redemptions."

The law and practice respecting foreclosure vary greatly in the several states, inasmuch as they have been continuously the subject of statutory enactment. Any text-book, therefore, must necessarily have been largely a convenient digest of statutes and decisions rather than a study of principles. And this was the case with Mr. Wiltie's work, which was an extremely intelligent and useful book for practical reference. The present supplement, entitled Volume II, digests the decisions since 1889 under various sections corresponding to those of the original work and does nothing more. There is the initial objection to this method that it is inconvenient in looking up a point, to be compelled in each case to look in two places, but there is a more fundamental objection. The law is not a dead thing with accretions from time to time, but it is an organic growth. Consequently, the presentation of the law as it was in 1889 with an estimate of its tendencies, followed by a digest of decisions since, simply leaves it to the practitioner to determine

the present law. Such a method of editing is, therefore, at once inconvenient and unscientific.

It is difficult to understand the principle upon which is based the supplementary portion upon what are termed "Mortgage Redemptions." It is apparent, that in any comprehensive survey of mortgage law, there is involved the consideration of the development from the common law conception of a mortgage as a sale upon condition strictly enforced, to the equitable doctrine "once a mortgage, always a mortgage." And mortgage foreclosure is simply the method of vesting in the mortgagee a title freed from the equity thus created. There can properly be no place for any supplemental chapters upon "Mortgage Redemptions," since a knowledge of the right of the mortgagor to redeem underlies the whole subject. However, the author has under this head considered the subject from the point of view of the mortgagor rather than that of the mortgagee, and has included a survey of the various statutes giving rights to a mortgagor to redeem after a so-called foreclosure.

On the whole, however, Mr. Wiltie's work was of the greatest practical service to the practitioner, and Mr. Kerr's supplement will be indispensable to those who have used the former work.

C. H. B., Jr.

A TREATISE ON THE LAW OF BAILMENTS, INCLUDING CARRIERS, INNKEEPERS AND PLEDGE. By JAMES SCHOULER, LL.D. Boston: Little, Brown & Co. 1897. Third Edition.

Professor Schouler's works are well-known to the profession and his readers turn to his books with the confidence that they will there find the result of painstaking research and accurate scholarship. This is especially true of his text-book on Bailments, the third edition of which is before us. It will be remembered that the author's treatment of the subject includes a general discussion of the nature of bailment, of the various kinds of "ordinary bailments" and of what he designates as "Exceptional bailments." Under the third head appears Prof. Schouler's concise and accurate summary of the law of common carriers. In preparing the third edition, the author has added to this branch of his work a useful chapter on the Interstate Commerce Act and the judicial decisions which have been rendered in connection with it. This chapter makes the survey of the subject a complete one. After passing it in review before his mind's eye, the reader is led to ask whether the special development of bailment in the case of the carrier has not, in modern times, attained proportions which demand for its treatment a work separate and distinct from such a general treatise as this. In other words, can the law relating to carriers be advantageously discussed within such limits as Professor Schouler has been compelled to set for himself? He cannot be criticised for answering the question in the affirmative, inasmuch as he has succeeded so well in his efforts at condensed statement. At the same

time, the question keeps recurring to one's mind, and one is almost led to wish that the author had made a more searching and extended historical investigation of the general topic and had reserved his discussion of carriers for a separate work. The author in the concluding paragraph of his book, has called attention to the contrast between the fixed principles which underlie the general law of bailment and the shifting rules of decision which characterize the rapid development of the law of carriers. He very properly observes that those who compare his text with the decisions of the courts will conclude that his guarded and modified statements in dealing with the latter subject are due, not so much to "a confusion of thought in the writer himself, as actual uncertainty among the courts." In this he is doubtless right; but the conclusion gives point to the query whether the two developments should not receive separate treatment. Whatever may be our feeling upon this point, we welcome the appearance of the third revised edition. It contains the latest cases and (as far as externals are concerned) is published in Little, Brown and Company's best style.

G. W. P.

A MANUAL FOR NOTARIES PUBLIC, GENERAL CONVEYANCERS, COMMISSIONERS, JUSTICES, MAYORS, CONSULS, ETC., AS TO ACKNOWLEDGMENT, AFFIDAVITS, DEPOSITIONS, OATHS, PROOFS, PROTESTS, ETC., for each State and Territory, with Forms and Instructions. Second Revised Edition. By FLORIEN GIAUQUE, A. M., of the Cincinnati, O., Bar. Cincinnati: The Robert Clarke Co. 1897.

The chief purpose of this work, which seems to occupy a unique position in legal literature of a purely practical character, is to supply notaries and others with the means of learning, not only what they are authorized to do under the laws of their own states, but also the extent of their authority under the laws of other states, and the manner in which they must act in accordance with such authority. Thus it is that the book, in addition to being an excellent form manual, partakes, in a measure, of the character of an elementary treatise on the law of conveyancers and notaries public. In addition to a preliminary chapter on "General Provisions," embracing the general and statutory powers of notaries, their fees, etc., and a chapter on Affidavits, Oaths, and Affirmations, there is an excellent treatment of the subject of Depositions, and a general survey of notaries' duties in the field of negotiable instruments, which deserves special mention. In this chapter, Presentment for Acceptance, Presentment for Payment, Protest, Notice of Dishonor, When Demand, Presentment, Protest, and Notice are unnecessary, and Statutory Provisions, as to Days of Grace, etc., are treated in an admirable manner, and the whole subject carefully annotated with reference to the illustrative cases. In the closing chapters the subject of notaries' duties in connection with

real estate, receives attention. In general, it may be said that the definitions are accurate, the arrangement convenient, and the typography good. It is hoped that the work will meet with the success the perseverance of the author merits for it. *J. A. M.*

GENERAL DIGEST. AMERICAN AND ENGLISH, ANNOTATED. New Series. Vol. III. 1897. Rochester, N. Y. : The Lawyers' Co-operative Publishing Co.

In this volume of the General Digest, the excellent features of the former numbers are retained, and the whole work improved and amplified by a system of annotation which partakes of a double character. First, the authorities relied upon in the opinion of the court in the cases digested, and the cases there criticised, distinguished or overruled, are cited; secondly, there is an independent compilation of the whole line of decisions involved, so that the law is traced through its various stages of development back to its starting point. The value of this addition to the Digest is apparent, for with its aid the busy practitioner can see at a glance whether a case is simply an isolated decision of no value, as a precedent, outside the particular jurisdiction of the court making it, or whether it is fortified by a sufficient number of precedents to make it authoritative elsewhere. It is worthy of note that the General Digest contains all officially reported cases, as well as those not to be officially reported, and that this difference is clearly marked in the citations. When the annotation has sufficiently matured, there is no doubt that the Digest will be all that its publishers claim, "a complete encyclopedia of the law based on the current cases."

J. A. M.

BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked * will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.]

TREATISES.

COURTS AND JURISDICTION. A Treatise on the Jurisdiction of the Courts of the Present Day, How Such Jurisdiction is Conferred, and the Means of Acquiring and Losing it. By JOHN D. WORKS, formerly one of the Justices of the Supreme Court of California, and author of "Indiana Pleading and Practice" and of "Removal of Causes from State to Federal Courts." Second Edition. Cincinnati: The Robert Clarke Company. 1897.

THE ORDER OF THE COIF. By ALEXANDER PULLING, Sergeant-at-law. Boston: Boston Book Co. 1897.

STATE CONTROL OF TRADE AND COMMERCE BY NATIONAL OR STATE AUTHORITY. By ALBERT STICKNEY, of the New York Bar. New York: Baker, Voorhis & Co. 1897.

A TREATISE ON THE LAW IN RELATION TO PROMOTERS AND THE PROMOTION OF CORPORATIONS. By ARTHUR M. ALGER. Boston: Little, Brown & Co. 1897.

A TREATISE ON THE LAW OF CARRIERS OF PASSENGERS. Two Volumes. By NORMAN FITTER. St. Paul, Minn.: West Publishing Co. 1897.

A MANUAL OF MEDICAL JURISPRUDENCE. By A. S. TAYLOR, M. D., F. R. S. Twelfth American Edition. By CLARK BELL. New York and Philadelphia: Lea Brothers & Co. 1897.

CELEBRATED TRIALS. By HENRY LAUREN CLINTON. New York and London: Harper & Bros., Publishers. 1897.

A TREATISE ON FRAUDULENT CONVEYANCES AND CREDITORS' BILLS. By FREDERICK S. WAIT. Third Edition. New York: Baker, Voorhis & Co. 1897.

A DISCUSSION OF THE LAW OF CONTEMPT. Written and Published by W. F. BAILEY. Eau Claire, Wis. 1897.

A TREATISE ON MARINE, FIRE, LIFE, ACCIDENT, AND ALL OTHER INSURANCES, including Mutual Benefit Societies; covering, also, General Average, and, so far as applicable, Rights, Remedies, Pleading, Practice and Evidence. By JOSEPH A. JOYCE. Four Volumes. San Francisco: Bancroft-Whitney Co. 1897.

A TREATISE ON THE LAW OF EVIDENCE, as administered in England and Ireland, with illustrations from Scotch, Indian, American and other legal systems, by his Honor, The late Judge PITT TAYLOR, Ninth Edition (in part re-written) by G. PITT LEWIS, Q. C.; with notes as to American Law, by CHARLES F. CHAMBERLAYNE. Three Volumes. London: Sweet & Maxwell, Ltd., 3 Chancery Lane. Boston: The Boston Book Co. 1897.

COMMENTARIES ON THE LAW OF TRUSTS AND TRUSTEES, as administered in England and the United States of America. By CHARLES FISK BEACH, Counsellor-at-law. Two Volumes. St. Louis: Central Law Journal Company. 1897.

THE LAW OF RAILWAY BONDS AND MORTGAGES IN THE UNITED STATES OF AMERICA, with Illustrative Cases from English and Colonial Courts. By EDWARD LYMAN SHORT, of the New York Bar; General Solicitor of the Mutual Life Insurance Company of New York. 1897.

THE LAW OF MINES AND MINING IN THE UNITED STATES. By DANIEL MORREAU BARRINGER and JOHN STOKES ADAMS, of the Philadelphia Bar. Boston: Little, Brown & Co. 1897.

DIGESTS.

MINERAL LAW DIGEST, embracing A digest of Decisions of the Courts and of the Land Department, under the Public Mineral Land Laws; a Brief Manual of Procedure with Forms, and a Manual of Mineral Surveys, and Departmental Regulations. By HORACE F. CLARK, Land and Mining Attorney, Washington, D. C.; Charles C. Helman, Asst Chief, Mineral Division, General Land Office; Charles F. Connel, Examiner of Contests, Mineral Division, General Land Office. Chicago: Callaghan & Co. 1896.

NEWTON'S DIGEST OF PATENT OFFICE TRADE MARK DECISIONS. By J. T. NEWTON, Examiner of Trade Marks, U. S. Patent Office. Chicago: Callaghan & Co. 1896.

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